THE HUMAN LIFE BILL
APPENDIX

HEARINGS
BEFORE THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 158
A BILL TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO EXIST FROM CONCEPTION

APRIL 23, 24; MAY 20, 21; JUNE 1, 10, 12, AND 18

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FOREWORD

This is the second volume on The Human Life Bill, based on eight days of hearings held by the Subcommittee on Separation of Powers of the Committee on the Judiciary. It comprises only submissions presented for the record by hearing witnesses and nonwitnesses.

All hearings were chaired by Subcommittee Chairman Senator John P. East of North Carolina. The hearings opened on April 23, 1981, and were completed on June 18, 1981. The submissions that are contained herein have been categorized and presented in eight parts. Many other submissions are on file with the subcommittee.

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APPENDIX

PART 1.--UNSOLICITED SUBMISSIONS FOR THE RECORD*

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UNCONSTITUTIONALITY OF "MOMENT OF CONCEPTION" BILLS

ANALYZED BY ARM'S ATTORNEYS

"Vague and Unenforceable" Law Would Also Ban
Many Contraceptive Techniques

The "moment of conception" bills (S.158, H.R. 900), which attempt to establish the fertilized human egg as a person, are flagrantly unconstitutional in three principal areas, announced Steven Delibert and Marshall Beil, attorneys for Abortion Rights Mobilization (ARM). A U.S. Senate Judiciary sub-committee begins hearings on its bill on April 23rd.

1. The bills attempt to overrule a constitutional decision of the U.S. Supreme Court, which is beyond the powers of Congress.

2. The bills attempt to reverse the Supreme Court's decision that the word "person" in the 14th Amendment "does not include the unborn".

3. Unconstitutionally vague and unenforceable, the bills could produce chaotic intrusions by the federal government into state law, and could compel the states to permit damage claims on behalf of the unborn.

"Many contraceptive techniques--the IUD and the birth control pill in some cases--could be outlawed as well as abortion rights," states Lawrence Lader, ARM president. "Who would determine if a woman was using outlawed contraception? Whether she'd be indicted for murder? Would the bill require a policeman in every bedroom?"

Steven Delibert, Esq., is a member of ACLU's Committee on Church and State and has acted as counsel on numerous cases involving civil rights.

Marshall Beil, Esq., is a member of the Committee on Federal Legislation of the Association of the Bar of New York, and of the Due Process Committee of ACLU.

Lawrence Lader, ARM President, is the author of "Abortion" and "Abortion II", and founding chair of National Abortion Rights Action League (1969-1975).

To Implement and Guarantee A Woman's Right To Legal Abortion as Decreed by the U.S. Supreme Court

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*Numerous other unsolicited submissions are on file with the Separation of Powers Subcommittee.

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RESPECTFULLY SUBMITTED ON
BEHALF OF
ABORTION RIGHTS MOBILIZATION
April 1981

by Steven Delibert
Marshall Beil
Karpatkin Pollet Delibert
& Beil
6 East 43rd Street
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MEMORANDUM CONCERNING CONSTITUTIONALITY OF S. 158 and H.R. 900

Two identical bills (S. 158; H.R. 900) have been introduced as attempts to overrule by statute the Supreme Court's constitutional decisions in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), the decisions which drastically limited the power of the states to regulate abortions.

The proposed statute is clearly unconstitutional and unenforceable. It adopts standards so vague that they could not be enforced, even if a court wished to do so; it attempts by legislative fiat to overrule a constitutional decision of the Supreme Court, which is clearly beyond Congressional power; and it does so by plainly erroneous misreading of the Fourteenth Amendment and of Supreme Court precedent.

First, the bill seeks to establish a standard, of "conception", as the point from which human life begins. But there is no clear moment of "conception", nor any consensus at all in the medical community, or otherwise as to exactly when "conception" may be deemed to have occurred.[1] No doctor, and no patient, faced with such a standard, could know what was made illegal or what conduct was forbidden; but particularly in an area touching upon rights so sensitive as those we here consider, the courts will not enforce such a vague statute.[2]

Second, the proposed bill is unconstitutional because it rests upon a clear and direct misreading of what the Supreme Court has already decided in Roe v. Wade. The central assumption of the bill is that Congress may act to define the moment at which human life commences, because the Supreme Court has supposedly announced itself - and the judiciary generally - incapable of reaching such a decision.[3] What the Supreme Court did in Roe v. Wade, however, was quite the contrary - it held clearly that in view of the innumerable conflicting, divergent, and ever-changing and shifting views on the beginning of life, scientific, theological, dogmatic and otherwise, no governmental entity, judicial or legislative, could speculate as to which was correct, or could arbitrarily adopt one theory of life over another, to "override the rights of the pregnant woman that are at stake."[4]

In passing the proposed statute Congress would not be merely filling a void left by judicial decisions; it would be attempting directly to overrule a constitutional decision of the Supreme Court.[5]

Finally, this legislation unconstitutionally seeks to reverse - by statute rather than constitutional amendment - a clear Supreme Court holding, in Roe v. Wade, that "...the word 'person' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. This direct challenge to the constitutional powers of a co-equal branch of government masquerades as a species of enforcement of the Fourteenth Amendment.

However, the proposed statute is not a means to enforce an acknowledged purpose of the Fourteenth Amendment; rather, it seeks in a wholly novel way to expand drastically the purposes of the Amendment itself, by dramatically expanding the class of "persons" whom the Amendment protects.

The Supreme Court, however, has never hesitated to review the question of whether the end sought by Congress - as opposed to the means selected - was one which was comprehended by the Constitution.[6] The Court would undoubtedly review Congress' decision on the reach of the Amendment; it would undoubtedly adhere to its prior decision in Roe v. Wade, that the unborn are not "persons" within the Fourteenth Amendment, and would accordingly hold the proposed statute unconstitutional.

Indeed, the very action of Congress in attempting to overrule by statute, a constitutional decision of the Supreme Court, would in itself violate the Constitution - and beyond that, it would represent a radical assault on the structure of our form of government that would be both foolish and dangerous.[7] If Congress were able to change the meaning of the Constitution by mere majority vote, there would be no need for the Constitution's careful amending provision, requiring a two-thirds vote by Congress and approval by three-fourths of the states.[8]

UNPREDICTABLE AND BIZARRE EFFECTS OF PROPOSED STATUTE

Unlike the laws existing prior to Roe v. Wade, this statute would outlaw all abortions: No exception could be allowed for pregnancies resulting from rape, or incest, or statutory rape; or for those threatening the health, or even the life, of the mother; or for any other circumstance. Further, many popular methods of contraception, like the IUD and birth control pill in some cases, would likewise be outlawed.

The statute's effects would not stop here. If fetal life is indistinguishable from a living person, then its extinction must also be punished. The doctor performing an operation, no matter how compelling the need, and no matter how grave the pregnancy's threat to the mother's life would be a murderer, and his patient an accessory; the friend who loaned a woman the money for an abortion would be a conspirator in murder. The patient herself would be the murderer, for the simple act of using an outlawed contraceptive.

The proposed statute, moreover, would intrude the federal courts into numerous areas traditionally reserved for regulation by the states. If a fetus is deemed to be human life from conception, the federal courts would compel the states to permit tort claims by or on behalf of the unborn, in exactly the same manner as by living human beings. The structure of insurance rates would be driven drastically upward. The impact upon inheritance and estate planning would be almost inconceivable; innumerable aspects of this area of the law are contingent upon existence of lives in being at various times, almost invariably measured from birth. What additional effects the bill might have upon rights of citizenship arising from birth, or upon the census, or upon revenue sharing, or upon countless other areas which have traditionally relied upon live birth as the touchstone of rights, would clearly be both dramatic and unwelcome.

In conclusion, then, S. 158 and H.R. 900 are ill-considered legislative proposals. They are not only unenforceable; the bills would also produce a clash of constitutional dimension between the courts and Congress, which would have consequences of the most dire nature. No legislator concerned for the well-being of this nation, liberal or conservative, pro-abortion or anti, should support this legislation.

FOOTNOTES

1/ Indeed, in Roe v. Wade itself, the Supreme Court explicitly noted the difficulties with adopting a standard of "conception" as the moment of life's beginning, noting the embryological data existing even then, suggesting "that conception is a 'process' over time, rather than an event..." Roe v. Wade, 410 U.S. at 161.

2/ The courts have made it patently clear that they will not enforce an abortion statute, which is insufficiently clear as to when in the course of a developing pregnancy it purports to become effective. See Doe v. Zimmerman, 405 F.Supp. 534 (M.D. Pa. 1975) (3-Judge Court).

3/ The article introduced in the Congressional Record as legal support for S.158 makes this assumption clear.

4/ 410 U.S. at 162. See Doe v. Israel, 358 F.Supp. 1193. 1199 (D.R.I. 1973) (Pettine, J.), cert. denied 416 U.S. 993 (1974), in which one of the most respected of District Judges considered a Rhode Island statute which purported to step into the breach allegedly left by the Supreme Court, by defining human life as beginning at conception. Such an effort, Judge Pettine held, was squarely at odds with the Supreme Court's decision, and unconstitutional.

5/ It could not do so, any more than a state legislature could do so. As a matter of constitutional law, Congressional fact-finding is treated in the same manner as that of the state legislatures. Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (per Harlan, J., concurring in part and dissenting in part).

6/ See South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966); Jones v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876). See also Doe v. Israel, supra, 358 F.Supp. at 1201, making plain that it has always been the Supreme Court which has determined the reach of the protected classes under the Fourteenth Amendment.

7/ The portions of the proposed bill which seek to deprive the federal courts of jurisdiction over abortion cases, and limit the precedential value of any court holdings of unconstitutionality, are not discussed here, but are plainly equally drastic and dangerous assaults upon our traditional form of government.

8/ The late Mr. Justice Harlan in his concurring and dissenting opinion in Oregon v. Mitchell, 400 U.S. 112, 204-205 (1970), wrote: To allow a simple majority of Congress to have final say on matters of constitutional interpretation is...fundamentally out of keeping with the constitutional structure.

4-25-81

1981 MAY -1 AM 11: 35

Craig

Dear Senator's East & Hatch.

I would like you place my comments in the Subcommittees Hearings for the record.

Life doesnt vote. Humans Vote.
A Human does not exhist as such untill "he" is breathing. till that is the case. "he" is just a living organism inside a womb. or artifical life support systems.
Sirs,
do you know of any humans who do not breath? This has been the most popular definition of human life since we started making deffinitions, life i.e. living is most important to the Mothers.
If we are so concerned with helping humans, give us all food, and, jobs, and dental care before we're drafted.

Thank You

LAKSAR GEER
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8

THE POSITION OF MODERN SCIENCE ON THE BEGINNING OF HUMAN LIFE

16 July 1975

SCIENTISTS FOR LIFE, INC.
1908 Washington Avenue
Fredericksburg, Virginia 22401

PART I
THE BEGINNING OF HUMAN LIFE

WHEN DOES LIFE BEGIN?

In the mind of the general public "When does life begin?" is one of the most critical, if not the key question in the abortion issue. Advocates of abortion rights and advocates of fetal rights answer this question differently, but generally they agree that the question is important.

The responses one gets to this question are many and varied:

Life begins at conception;
Life begins at viability;
Life begins at birth;
Life begins when there is social interaction;
It is a question science cannot answer;
The answer is a matter of religion.

All of those answers are wrong.

There are two reasons why we have so many wrong answers on such a vital subject. The first is that hardly anyone has stopped long enough to analyze the question. The second is that hardly anyone has asked the question of the people who know the answer. In this report we shall show that the question is not only ambiguous and improper -- it is not even the right question.

No one would think of calling a plumber when his TV set breaks down or asking his pharmacist to defend him in court. But when people want to know when life begins they ask their minister, a philosopher, or a physician. These men are all experts, but they are the wrong experts. The expert on the subject of life is the biologist. Biology is the science of life. Yet hardly anyone has sought his counsel.

Science not only has an answer to the question of when life begins, it has the answer. The importance of getting the scientific answers on abortion cannot be overestimated. The scientific answers are based on fact rather than opinion, on observation rather than conjecture, on reason rather than emotion. Because of this they are uncolored by bias, prejudice, religious inclination or philosophical viewpoint. Therefore they are uniquely suited for achieving a concensus in a pluralistic society. The reader may be surprised to learn, for example, that scientists who strongly oppose abortion agree with scientists who strongly favor a liberal abortion policy when it comes to answering this question.

We will begin by analyzing and answering the question "When does life begin?" Then we will proceed to the asking, analysis, and answering of better, more pertinent questions until the issue has been clarified to the greatest extent possible. Numerous quotations will demonstrate the agreement of scientists on the points being made.

What Is Life?

When we face the question "When does life begin?" the first thing we have to settle is what kind of life we are talking about. Until that is decided the question remains highly ambiguous. This is because Webster gives 21 definitions of life, not counting subdivisions (1). Depending on which definition we chose, the answer could vary from "Life existed from all eternity" to "Life begins at death"!

The kind of life that is involved in the abortion issue, the kind that is free of subjective interpretation and therefore suitable for decisions affecting a pluralistic society, is biological life. But having made this choice, we are immediately faced with a paradox: Although a fundamental understanding of biological systems has existed since the middle of the nineteenth century, there is no generally accepted definition of biological life. (2) Fortunately, this does not affect the discussion of life as it pertains to abortion. The disagreement pertains to borderline forms of life like viruses and the virus-like agent called scrapie. When it comes to the stages of reproduction there is no disagreement about what stage is alive and what is not. To draw a simple analogie, dusk and dawn may obscure the question of the exact moment when day turns into night or night turns into day, but no one doubts which category applies to noon or midnight.

A Trick Question

The question "When does life begin?" is a trick question. This is readily made apparent by rephrasing it as follows: "In human reproduction there is a point in time when life begins. When does that point occur?" If you're not careful you find yourself puzzling over the question, but not questioning the truth of the preliminary statement. This is not just a quibble. The point strikes at the heart of the whole difficulty: The question is an improper question because it contains an unwarranted presumption.

The Answer

In human reproduction, biological life does not begin; it is continuous. There is no period where life stops and later starts up again. Cells come only from living cells. If the ovum were not alive and mature, it would never be fertilized. If the sperm were not alive it couldn't even reach the ovum, much less fertilize it. The continuity of life is a principle that both pro-life and pro-abortion scientists agree upon.

Professor Garrett Hardin is a member of the Department of Biological Sciences at the University of California at Santa Barbara and a leading abortion rights activist and strategist. Writing in Psychology Today (3) Professor Hardin says:

> But when does life really begin? The true answer is simple: Never. Life ends, often, but it never begins. It is just passed on from one cell to

> another. All biologists...are in agreement on that answer.

Professor Hardin reiterates this point in his book Mandatory Motherhood (4) and says that he should think that all medical men would also be in agreement. He goes on to add:

> How odd it is then to read the cautious language of Justice Blackmun in the majority opinion of the Supreme Court.... Any other opinions philosophers and theologians may have are not supported by facts.

Professor Joshua Lederberg, Nobel Laureate of the Department of Genetics of Stanford University is another pro-choice scientist. Yet, in an article favoring abortion he writes: (5)

> For life is a continuum; if life had a beginning at all, it was an event that occurred some 3 billion years ago.

Professor Roberts Rugh, a pro-abortion embryologist, and Landrum B. Shettles, MD, position unknown, refer to this principle in terms of "The perpetual flame of life...." (6) The eminent biologist Theodosius Dobzhansky puts it simply: "Life arises only from preexisting life." (7) Table 1 provides additional supporting documentation.

The principle of the continuity of life is so well established and so generally accepted that it might not be going too far to call it the first law of biology. Contrary to what some obscurantists would have us believe, this a matter of science and not of religion. Atheistic, agnostic, Christian and Jewish scientists agree on this point. There is no point or interval from fertilization to birth, therefore, where the unborn offspring is not alive.

However, in answering this question we have jumped the bounds of the abortion issue, we have included sperm and ova in the life continuum, we have blurred the distinction between the gametes and the zygote, we have spilled over into the subject of contraception. That is because we have been dealing with the wrong question. Let's try a different one.

WHEN DOES LIFE BECOME HUMAN?

We can see at the start that this question suffers from some, if not all of the difficulties of the previous question. The question is presumptive, and human needs to be defined. However, treatment of the previous question helped us to establish the fact that the unborn offspring is at all times alive, so perhaps treating this question will not be a waste of time either. In this case, however, some historical background is in order.

The Biogenetic Law

The field of comparative embryology was pioneered by the great German biologist Karl Ernst von Baer. In comparing the embryos of different vertebrates, von Baer found that he could not say even what class of vertebrates early embryos belonged to without looking at the labels, so great was their similarity. This led von Baer in 1824 to advance his law of corresponding stages, according to which the embryos of higher animals resemble or correspond to the embryos of the lower forms from which they evolved.

Some years later another German biologist, Ernst Heinrich Haeckel, extended von Baer's law to say that the embryos corresponded to the adult stages of their predecessors. This biogenetic law he summed up in the now famous statement that ontogeny (embryonic development) recapitulates phylogeny (the evolutionary history of the species). This law became taken as a proof of evolution and the subject of intensive research for three decades. Eventually Haeckel announced to the 4th International Zoological Congress that he could trace man's ancestry in this manner through 26 stages of evolution.

Today Haeckel is known as a scientist who let his imagination run away with him to the point where he unscrupulously distorted the facts to fit his theories. His biogenetic law has been discredited, but its influence lives on in the erroneous belief that the human embryo is at various stages a protozoa, fish, lizard, etc.

What Do We Mean by "Human"?

The adjective "human" is used to describe that which is characteristic of man as a species distinguished from other animals. Biologically there are two criteria of what is human, one intrinsic and one extrinsic. Extrinsically, that which is of human origin is human. By this criterion human applies to such things as sounds, footprints, excrement, etc, as well as human beings. The criterion proper for the discussion of abortion is the intrinsic criterion which depends upon genetic constitution. Normally this constitution is contained in a set of 46 chromosomes which is present in almost all the cells of the human body. Human cells with 46 chromosomes are called diploid. The sex cells or gametes, which have only 23 chromosomes, are called haploid.

The Answer

Just as in the previous case, the answer to the question "When does life become human?" is never. Like life, humanity is continuous. Intrinsically and extrinsically, the sperm, the ovum, the zygote, and all the cells, tissues and stages that arise from the zygote are human. None of them can ever be characterized as belonging to any other species. Human life is not started -- it is transmitted. There is no instant or interval of time between fertilization and birth when the unborn offspring is anything but human.

Dobzhansky sums up the situation by saying: (7)

> An embryo of a higher animal is never basically like any other animal, only like the embryo of the latter.... In other words, the development of the embryo does not reproduce for our benefit the portraits of the near or remote ancestors.

G. L. Flanagan writes: (8)

> From their first hour the human cells are distinctly human.

The knowledgeable members of the medical profession are of course in complete agreement. Thus the International Code of Medical Ethics states: (9)

> A doctor must always bear in mind the importance of preserving human life from the time of conception until death.

Similarly, the Declaration of Geneva reads: (10)

> I will maintain the utmost respect for human life from the time of conception.

Abortion, then, must be the taking of human life. That such is the case is candidly admitted in an editorial in the pro-abortion journal California Medicine: (11)

> The reverence of each and every human life has been a keystone of western medicine, and is the ethic which has caused physicians to try to preserve, protect, repair, prolong, and enhance every human life.
>
> Since the old ethic has not yet been fully displaced, it has been necessary to separate the idea of abortion from the idea of killing which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception, and is continuous, whether intra- or extra-uterine, until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because, while a new ethic is being accepted, the old one has not yet been rejected.

But if life is continuous and humanity is continuous, what's the difference between the sperm and ovum before fertilization and the zygote after fertilization? They are all human life, are they not? Which brings us to our next question.

WHEN DOES HUMAN LIFE BECOME A HUMAN BEING?

There are several differences between a zygote and either a sperm or an ovum. One is in information content. The haploid gametes have only half the genetic information that a zygote has. But that would not alone indicate a difference between the zygote and the gametes taken together. To answer the question we must first consider a well known principle of geometry.

The Whole Is Equal to the Sum of the Parts

This principle applies not only in mathematics but in many branches of science, provided we interpret "is equal to" in a quantitative sense. If we use it in a qualitative sense we find many exceptions: numerous chemical reactions; the binary weapons where harmless ingredients are mixed to make explosives or deadly nerve agents; and, most dramatically, the union of two subcritical masses of plutonium to produce a nuclear explosion.

The destiny of the ovum is either to be fertilized or to die. In either case it ceases to exist as a gamete. The similar destiny of the sperm is to fertilize or to die. In fertilization the gametes loose their identity and individuality and fulfill their destiny. The result is a new individual, with a new life and a new unique identity and a new unique destiny. One way to illustrate the importance of this new individual is to look at the question...

When Did Your Life Begin?

The answer to this question can be phrased simply by going backward in time. Before you were an adult, you were an adolescent, and before that a child, and before that an infant. Before you were an infant -- i.e., before you were born -- you were a fetus, and before that an embryo. Before you were an embryo, around the time of your implantation, you were a blastocyst, and before that a morula, and before that a zygote or fertilized ovum. However, you were never a sperm or an unfertilized ovum. Therefore, while life is continuous, *your* life began when the nucleus of your father's sperm fused with the nucleus of your mother's ovum, or at fertilization. Thus Rugh and Shettles approvingly quote Margaret Shea Gilbert as saying: (12)

> Life begins for each one of us at an unfelt, unknown, and unhonored instant when a minute wriggling sperm plunges headlong into a mature ovum or egg.

Or as Leo Schneider puts it: (13)

> *You* are composed of trillions of cells now, but at one time in *your* life *you* were just a single cell.

The emphasis is Schneider's. According to G. L. Flanagan: (8)

> A baby begins life as a single cell, smaller than the period at the end of this sentence.

Other quotations appear in Table 1.

So we see that there is something important, something special, that occurs at fertilization: A new life, a new human life, begins.

But Is It a Human Being?

The term "human being" is used interchangeably with "human individual", which is frequently shortened to just "individual". It signifies a complete, though not completed, living, organized, unique, individual human organism, always more or less dependent on other human beings, but always with a certain amount of autonomy and charge over its own destiny. The zygote fits all of these criteria. The informationally complete cell has an information content equivalent to 1000 volumes of the Encyclopaedia Britannica and unlike tha of any other human being. If it does not twin it will retain this uniqueness. The new cell is programmed to divide, differentiate, form hormones and enzymes, implant, develop organs, brain, nerve and bone, eventually becoming an adult and repeating the cycle. Thus Ingelman-Sundberg and Wirsen write: (14)

> When does an embryo in a human mother become a human being? It has been one all the time, since the moment of conception.

Even abortion advocate Ashley Montagu admits: (15)

> Every human being starts off as a fertilized egg.

While Theodosius Dobzhanski says: (7)

> A human being begins his existence when a spermatozoon fertilizes an egg cell.

These answers are as well established and completely objective as any that science has to offer. These facts are no more a matter of religion than $E = mc^2$ or 1 + 1 = 2. They are not matters of opinion, conjecture, speculation or theory. Rather, they are the expression of reality as determined by scientific observation and analysis. To deny them is to lose touch with reality.

TABLE 1
ADDITIONAL SUPPORTING DOCUMENTATION

G. L. Flanagan: (7)

> In a sense, each new life actually has no definite beginning.
>
> The ensuing fusion of the two (nuclei) is called fertilization, and it is the vital event which initiates the development of a baby.

Bradley M. Patten: (16)

> It is the penetration of the ovum by a spermatozoon and the resulting mingling of the chromosomal material each brings to the union that culminates the process of fertilization and initiates the life of a new individual.
>
> Every one of the higher animals starts life as a single cell -- the fertilized ovum.... The union of two such sex cells to form a zygote constitutes the process of fertilization and initiates the life of a new individual.

F. R. Lillie, U. Chicago Press, 1919, quoted approvingly by Patten:

> There is perhaps no phenomenon in the field of biology that touches so many fundamental questions as the union of the germ cells in the act of fertilization; in this supreme event all the strands of the webs of two lives are gathered in one knot, from which they diverge again and are rewoven in a new individual life-history.... The elements that unite are single cells, each on the point of death; but by their union a rejuvenated individual is formed, which constitutes a link in the eternal procession of life.

Axel Ingelman-Sundberg and Claes Wirsen: (14)

> Actually it is a living being from the moment of conception.
>
> The unborn child is a person no one knows.

Beth Day and Dr. Margaret Liley: (17)

> A human life begins with a single cell. This new cell is the product of two other cells -- one from the mother, which we call the egg cell, or ovum, and one from the father, which is known as the sperm cell.

Bradley M. Patten: (16)

> It should be recognized, however, that hatching or birth is but a convenient landmark in a continuing process and that development is in reality an uninterrupted chain of correlated events.

TABLE 1 (continued)

Amram Scheinfeld: (18)

> A single sperm enters a single egg, and a new individual is started on its way.

Bart Heffernan: (19)

> From conception the child is a complex, dynamic, rapidly growing individual.... At fertilization a new and unique individual is created which, although receiving one-half of its chromosomes from each parent, is really unlike either.

H. M. I. Liley: (20)

> Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone.... At the very least there are two people involved, the mother and her child.

A. W. Liley: (21)

> ... the foetus is not a passive,dependent, nerveless,fragile vegetable, as tradition has held, but a young human being, dynamic, plastic, resilient and in very large measure in charge of his environment and destiny.

Treloar, Behn and Cowan: (22)

> The initiation of a new life occurs at the moment when fertilization is completed by fusion of the two sets of chromosomes.

Blechschmidt: (23)

> (The zygote is) schon ein Individual -- spezifischer Mensch.

Professor Jerome LeJeune: (24)

> If a fertilized egg is not by itself a full human being, it could never become a man, because something would have to be added to it, and we know that does not happen.

Isaac Asimov: (25)

> ... all organisms, however large and complex they may be when full grown, begin life as but a single cell. This is true of the human being, for instance, who begins life as a fertilized ovum.

Abortion advocate Ashley Montagu: (26)

> At fertilization you weighed about fifteen 10 millionths of a gram.

TABLE 1 (continued)

Paul A. Weiss: (27)

> Genes never lack environment right from the moment at which we arbitrarily choose to start our dating of the development of an individual -- the fertilized egg.... Since these gene-environment interactions are never interrupted, the general idea that "environment" enters the scene only when the bird hatches or the baby is born should be expunged....

A. O. Woodford: (28)

> But the implications as to lines of descent are not now taken seriously. The tiny genes in the first cell of a new individual contain the whole program for its later development. The genes are similar to a program fed into a computer, telling it what things to do and the order in which to do them. The program for the development of an individual organism may include a favorable variation from the previous norm, and the variation may become part of the distinctiveness of a new species. But only chance would produce a variation of the adult form and also produce at an immature stage the previous adult form.

J. A. F. Roberts: (29)

> A human being originates in the union of two gametes, the ovum and the spermatozoon. These cells contain all the new individual inherits organically from his or her parents.

Philosopher Germain Grisez, in summarizing his study of the scientific literature on the subject: (30)

> The sex cells are formed from the living matter of man and woman; the sex cells are themselves alive. And so the result of their union does not really come to life, but simply comes to be a unified life -- a new individual. If the mature sex cells do not unite to form a new individual, they soon die. Their specialization is for reproduction; they are unable to become blood or nerve or bone or muscle or any other sort of tissue unless they join in the development of a new individual.

It is interesting and significant that Professor Grisez has reached the same conclusions we have from his study of a large number of references that is almost completely different from the ones we have cited.

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PART II

PERSONHOOD

INTRODUCTION

The very mention of the word "personhood" at this point in our discussion immediately gives rise to a host of questions:

> Does science have anything to say on this subject?
> Does one have rights because he is a person, or is he a person because he has rights?
> Do rights have their source in nature, or because they are granted by some group or organization?
> Is "person" a concept with objective reality, so that I know that I am one if I fulfill the qualifications, or is "person" a matter of definition?

The existence of these four questions does not mean that we have to trace through 16 paths in order to cover the territory completely. The situation becomes simplified by the realization that there are basically two fundamentally different approaches: one approach gives one set of answers, and the other approach gives the opposite set. Which approach we choose has profound implications for the nature of the society and the character of the government that will eventually result.

THE TOTALITARIAN APPROACH

If we take the approach that the individual exists for the good of some power like society or the state or the party, then the power becomes the source of rights. In determining what rights are to be accorded which individuals, individuals become persons to the extent that the power decrees. Thus "person" is defined and redefined according to the prevailing policy and political strategy. Science has nothing to say on the subject.

It is important to note that this totalitarian approach can be taken in a democracy if it is decided that the will or opinion of the majority is the power from which rights and personhood are to be granted. If it is, then minorities have only those rights which the majority chooses to give them, or, if they are strong enough, they can wrest from the majority by threat and force and violence. Might makes right. Civil rights becomes an empty concept.

THE INDIVIDUALIST APPROACH

If, on the other hand, we take the approach that the state and society exist for the good of the individual, "that all men are created equal" (1), that they are endowed "with certain inalienable Rights" (1), that governments derive "their just powers from the consent of the governed" (1) and that their purpose is to "secure the blessings of liberty for ourselves and our posterity" (2), then we obtain a different set of answers:

Person is an objective concept and science has something to say about what a person is. Personhood is the source of rights that cannot justly be taken away by any individual, group, or earthly power. Rather than being a matter of arbitrary definition, "person" has its proper definition, and we must find out what it is and to whom it applies.

THE OBJECTIVE DEFINITION OF PERSONHOOD

"Person" is not a scientific term. However, the determination of its meaning is achievable through rational analysis and procedure, and its definition can be grounded in fact through scientific interpretation. The logical approach to an objective definition begins with a consideration of the criteria such a definition should meet.

First, in discussing the abortion controversy we are not really concerned with all persons: not with spiritual persons, dead persons, or fictitious persons. Whether or not these are included in the definition is beside the point. The purpose of the definition is to establish a set such that all members of the set are persons and no real, live, material person is not a member of the set.

Second, the boundaries of the set must be natural and reasonably clear. While natural boundaries are never perfectly sharp, ambiguity should be minimized and error should be on the side of overprotection. For the definition to be functional it should be operational.

Third, the definition should be in accord with the usual meaning of the word as given in standard references. It must be independent of philosophy or creed to apply to a pluralistic society.

The first place one thinks of looking for a standard and impartial definition is the dictionary. Dictionaries are authoritative references that are not involved in controversies and whose definitions reflect the common meaning of terms. In Webster's unabridged dictionary we find "person" defined simply as an individual human being. (3) This definition obviously satisfies the third criterion. As for the first criterion, all real, live, material persons are certainly human beings. Those who wish to exclude some human beings from personhood on objective grounds will have to accept the burden of proof. With regard to the second criterion, Part I clearly established that fertilization was the natural and scientific boundary where the new human individual began his existence. Various objections to these conclusions will be treated in Part III. For the present, however, it should be realized that there is no method of abortion known at the present time that kills a human life at the zygote stage.

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PART III
OBJECTIONS

CONCEPTION IS NOT AN EVENT BUT A PROCESS OVER TIME

This objection was raised by the U. S. Supreme Court in the case of Roe v. Wade. (1) From the ensuing discussion it appears that the Court was confused by an attempt of the American College of Obstetricians and Gynecologists (ACOG) to change the meaning of conception. In the past, conception has been used as the equivalent of, and interchangeably with, fertilization. ACOG would make it equivalent to implantation, a process which goes on for days.

One could also say that fertilization is a process over time in that it begins when the sperm impinges on the ovum ("activation") and ends about an hour later with the fusion of the pro-nuclei. To make an issue of this, however, would be to quibble, since fertilization can with equal validity be called an event. If an event had to take place in zero time there would be no such a thing as an event because it would require the release of an infinite amount of energy.

In scientific terminology an event is a significant element in a chain of circumstances, the duration of which is relatively short, and the details of what transpires during that interval are of minor significance. Typical events involve the disappearance of reactants, perhaps the transitory existence of a short-lived intermediate (e.g., the compound nucleus in nuclear fission and the activated complex in chemical reactions) and the appearance of a product or products. The difference between the reactants and products may be accidental (as it is in elastic collisions) or essential (as in pair production). There is nothing in the whole of human development that deserves more to be called an event than does fertilization, nor is there anything else that involves such an essential change.

EARLY ABORTIONS OCCUR BEFORE THE CHILD HAS A SOUL

Philosophers and theologians have long discussed the question of when an individual receives a human or immortal soul, and there is still no universal agreement. There are a number of scriptural texts that indicate that the unborn child has a soul (2) but there is no clear statement on when it gets it.

A significant number of philosophers and theologians hold that the soul is infused at the time of fertilization. This view is called immediate animation, and it is in full accord with the scientific facts. Therefore, no one can be certain that the soul is not infused at this time. To paraphrase the ethical argument of Germain Grisez: (3) To be willing to kill what for all one knows could have a soul is to be willing to kill it if it has a soul. Therefore one cannot evoke the ensoulment controversy as a justification for legalized abortion on demand in the early stages of pregnancy.

THERE IS NO SIMPLE DEFINITION OF WHAT IS ALIVE AND WHAT IS NOT ALIVE, WHAT IS HUMAN AND WHAT IS NOT HUMAN

This is the position taken by Malcolm Potts and certain other pro-abortion scientists and medical men. The difficulty in defining life was discussed and answered in Part I. The definition of what is human is complicated by the existence of teratomas and hydatidiform moles. This can be obviated as we have done by including the concept of organization in the definition. But even aside from this aspect the argument is irrelevant. Teratomas and hydatidiform moles are never involved in abortion decisions. (4)

THE ZYGOTE IS OF NO MORE VALUE THAN A BLUEPRINT

Professor Garrett Hardin is fond of repeating this argument (5) which goes like this: The only thing of value about a zygote is its information content. This information is like a blueprint of the future child. If you destroy a blueprint it's not like destroying a house. So it is with the zygote and child. The blueprint is easily and cheaply replaced and so is the zygote. It doesn't matter that the information was unique and unrepeatable. True, it might have been another Beethoven, but it also might have been another Hitler.

The argument invokes a utilitarian ethic by putting a price tag on human life. As development proceeds, the price goes up. According to Professor Hardin's lifeboat ethics (6) when there is an oversupply of people the price comes down again. Furthermore, the analogy is dehumanizing and grossly misleading. The living human being is equated to its heredity which is likened to a blueprint, thereby making the zygote equivalent to a non-living thing. Zygotes become infants but blueprints do not become houses; human beings grow but houses are built. Another fault of the argument is tha zygotes, as we have pointed out, are never aborted. The earliest abortions occur by preventing implantation of the blastocyst, a far more complex and developed stage than the zygote.

There is nothing in the blueprint analogy that invalidates any of the facts we have presented.

HOMINIZATION DOESN'T OCCUR UNTIL AFTER IMPLANTATION

Dr. James J. Diamond, a surgeon and well meaning but misinformed pro-lifer advances this view in America magazine. (7) Without defining hominization, Dr. Diamond argues that

> Weighty biological arguments can be adduced to support the belief that at fertilization only the character of the subsequently hominized entity is established and that biological hominization does not occur until about two weeks later at a time near implantation. Since science presents no certitude that life begins before this "gray" period has passed, a state of probabilism exists

> with a strong tilt toward the more probable, (sic) holding that human life ought not ... to be held to exist until conception (meaning implantation).

Dr. Diamond goes on to claim support for his position from the Vatican II document on "The Church in the Modern World" and from the Catholic theologians Charles Curran, Richard A. McCormick, Joseph Donceel and Bernard Haering.

The word hominization comes from Teilhard de Chardin who uses it to refer to the development of reflective self consciousness of matter itself rather than of individual life. (8) To use it in an evolutionary sense and then apply it to fetal development is but to repeat the error of Ernst Haeckel (see Part I).

In Section 51 of"The Church in the Modern World"the text reads:

> Therefore from the moment of its conception life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes.

There is nothing in the text to indicate that conception as used here refers to ACOG's redefinition rather than the traditional meaning of fertilization. The recent Vatican declaration on abortion confirms this interpretation and pulls the theological rug out from under Dr. Diamond's position by its clear and scientifically sound statement that life must be protected from the moment of fertilization.

TWINNING AND RECOMBINATION

Twinning can occur from the time of the first cleavage of the zygote up to some time around implantation. The result is identical or homozygous twins. How, then, can a person divide in two and become two persons? Moreover, there is some evidence that two individuals in the early stages can combine and become one. The idea of two persons becoming one is equally difficult to accept.

While some philosophers and theologians consider this an important objection, it is not without precedent for the biologist, nor is it an important objection to other philosophers and theologians.

First with regard to twinning, it is well known that life at a rudimentary state of organization can reproduce by asexual fission. Even at fairly high organizational states a severed organism can become two organisms by regeneration. The best known example occurs with the planaria. We know now that human beings, before their systems become too highly organized, can reproduce by similar mechanisms. Philosophers that base their theories on the scientific facts simply regard the twins as the grandchildren of the adult couple or the children of the zygote.

The early fusion of zygotes is readily accomplished experimentally in mice. There is no human being known to have matured from this process. There are people who have cell populations of more than one genotype. Basically this can occur in one of two ways.

If one zygote is involved the individual is called a mosaic and one of the cell populations develops from a mutant cell where the mutation occurs at an early stage of development. If two zygotes are involved the individual is called a chimera. This is thought to result from double fertilization where two sperm cells penetrate a single ovum, but the combination of two zygotes has also been suggested as a possibility. (9) If it were ever proved that an individual resulted from the combination of zygotes from two separate ova it would still have no effect on the conclusions of this paper. It would merely mean that we have to revise our preconceived notions about what biological processes individuals can undergo at rudimentary stages of organization.

Philosophical reaction to this possibility varies from one philosopher to another. The fact that it need not cause any difficulty is shown by William H. Marshner's penetrating analysis of the situation.(10) Marshner concludes that, like twinning, combination or recombination is metaphysically nonproblematic:

> One of the twins dies, and his matter, in whole or in part, is rejoined to the other.... if biology wishes to say, "The life of a human fertilized ovum is, plainly, human life," philosophy is not in a position to register an objection. That is, philosophy cannot prove that the precious thing we call human life or personhood is not present from the moment of fertilization (on the contrary) the biologist's definition has considerable philosophic support.

PARTHENOGENESIS

Parthenogenesis is the development of an individual from an unfertilized ovum. It occurs naturally in some animals and can be induced in others. Although it has been induced in mammals, the resulting individual has never survived beyond the fetal stage. In Genetic Fix (11) Amitai Etzioni quotes Professor Colin R. Austin of the Physiological Laboratory in England as saying

> The view (that fertilization is the start of individuality) is illogical because it assumes that the oocyte (ovum) lacks the potential for development until fertilization occurs.... The commonsense assessment must therefore apportion very minor rights to the preimplantation embryo, certainly no more than to an ovary with its many thousand oocytes. On these grounds the initiation of embryos in vitro and their use in the course of attempts to meet genuine human needs are acts of equal ethical standing to those acceptable for medical therapeutics.

The argument is weak in several respects. First, it may even be impossible to induce parthenogenesis in humans, for all we know.

Second, from what Professor Austin says, the conclusion that human rights should be extended to ova would be just as valid as the conclusion that they should be taken away from zygotes. Thirdly, as Professor Grisez has pointed out (12), the fact that the ovum would have to be stimulated to develop parthenogenetically demonstrates that it is not equivalent to a zygote "for the stimulation leading to such extraordinary development is precisely what the human ovum normally does not undergo."

BUT I JUST DON'T FEEL THAT IT'S HUMAN. WOULDN'T A BETTER CRITERION BE ...

... implantation, heartbeat, brain waves, quickening, viability, birth, social interaction, puberty ... ? The list is long and could be extended indefinitely, but all the criteria suggested are vague or arbitrary or unsupportable for one reason or another. The key word is "feel", and the approach is as old as it is dangerous. From time immemorial it has been at the root of man's inhumanity to man because one segment of the population would not "feel" that another segment was truly human, and this "feeling" would then become the justification for injustice and oppression.

The progress of science has continuously brought forth instances where reality has been found to be different than we "felt" it should be: The extremity of smallness reveals the emptiness of solids, the extremity of speed leads to the paradoxes of relativity, the extremity of accuracy leads to the mysterious uncertainty principle, the extremities of mass lead to black holes at one end and quantum mechanics at the other, the extremities of space and time still resist comprehension. In view of all this we should be surprised if the extremity of personhood did not lead to a surprise.

Normal human beings have strong psychological inhibitions against killing other human beings. They must be prepared for violent solutions to social problems by breaking down these barriers. The intended victims must first be dehumanized, and dehumanization must be preceded by isolation, estrangement, and disrupted communication. The lie cannot survive in confrontation with facts and experience. The march of civilization has been a slow but steady eradication of dehumanization and violence. As a solution to social ills, abortion is a step on the road back to barbarism.

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(10) William H. Marshner, "Metaphysical Personhood and the IUD", *The Wanderer* *107*: No. 45, November 7 1974.

(11) Amitai Etzioni, *Genetic Fix*, MacMillan, 1973.

(12) *Op. cit.*

PART IV

SUMMARY AND CONCLUSIONS

(1) The kind of life applicable to discussions of abortion in a pluralistic society is biological life.

(2) Biological life does not begin; it is continuous. A cell can come only from a living cell.

(3) The biological criterion of "human" lies in the genetic constitution of the cells and in their origin.

(4) The quality of being human does not begin; it is continuous. A human cell can come only from a living human cell.

(5) The biological life of an individual begins at fertilization. From that time until death, the individual is never anything but alive, never anything but human. He is a human being.

(6) These facts are not matters of religion or opinion or theory. They are the results of scientific observation.

(7) In a pluralistic society the meaning of personhood must transcend personal creeds and opinions. The objective definition of personhood is the dictionary definition, and this is also the biological definition.

(8) By objective and scientific criteria, the individual is a person throughout his entire biological development.

(9) A number of objections and counterproposals have been made to this position, but none of them are supportable.

(10) To remain on sound ground, philosophers and theologians cannot ignore or discount these facts and principles. Nor is there anything but support for them in scripture. Indeed, there are many philosophers and theologians who completely agree with them.

(11) No one can be forced to give up their own contrary subjective views on these matters, but history has shown over and over again the tragic results of using unscientific criteria of humanity and personhood.

SCIENTISTS FOR LIFE

"Scientists for Life" is a pro-life organization of professional men and women. Its purpose is to promote respect for human life at all stages of biological development, from fertilization till death, and to educate the public on the consequences of interfering with such life. It is non-profit, non-sectarian and non-political. Its functions are scientific and educational. It marshals the authority and prestige of the scientific community in support of the pro-life position.

The extent of participation is left up to the individual member. Members keep in touch through a newsletter and the distribution of educational material. Activities include the formation of a roster of pro-life scientists, the preparation of authoritative articles and statements, organization of symposia, participation in world food and population efforts, the publication of books, the presentation of papers at scientific meetings, and assisting local educational groups and institutions.

Membership in Scientists for Life is international. Membership is open to anyone with a degree in science who supports the purposes of the organization. The group is formed to complement, rather than duplicate, other professional pro-life groups. However, if physicians and surgeons are unable to locate a suitable medical group, or are involved in research, they are welcome to join.

SCIENTISTS FOR LIFE, INC.

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THE NEW YORK TIMES, MONDAY, JUNE 8, 1981

A View of Abortion, With Something To Offend Everybody

By Walker Percy

COVINGTON, La. — I feel like saying something about this abortion issue. My credentials as an expert on the subject: none. I am an M.D. and a novelist. I will speak only as a novelist. If I give an opinion as an M.D., it wouldn't interest anybody since, for one thing, any number of doctors have given opinions and who cares about another.

The only obvious credential of a novelist has to do with his trade. He trafficks in words and meanings. So the chronic misuse of words, especially the fobbing off of rhetoric for information, gets on his nerves. Another possible credential of a novelist peculiar to these times is that he is perhaps more sensitive to the atrocities of the age than most. People get desensitized. Who wants to go about his business being reminded of the six million dead in the holocaust, the 15 million in the Ukraine? Atrocities become banal. But a 20th century novelist should be a nag, an advertiser, a collector, a proclaimer of banal atrocities.

True legalized abortion — a million and a half fetuses flushed down the Disposall every year in this country — is yet another banal atrocity in a century where atrocities have become commonplace. This statement will probably offend one side in this already superheated debate, so I hasten in the interests of fairness and truth to offend the other side. What else can you do when some of your allies give you as big a pain as your opponents? I notice this about many so-called pro-lifers. They seem pro-life only on this one perfervid and politicized issue. The Reagan Administration, for example, professes to be anti-abortion but has just recently decided in the interests of business that it is proper for infant-formula manufacturers to continue their hard sell in the third world despite thousands of deaths from bottle feeding. And Senator Jesse Helms and the Moral Majority, who profess a reverence for unborn life, don't seem to care much about born life: poor women who don't get abortions, have their babies, and can't feed them.

Nothing new here of course. What I am writing this for is to call attention to a particularly egregious example of doublespeak that the abortionists — "pro-choicers," that is — seem to have hit on in the current rhetorical war.

Now I don't know whether the human-life bill is good legislation or not. But as a novelist I can recognize meretricious use of language, disingenuousness, and a con job when I hear it.

The current con, perpetrated by some jurists, some editorial writers, and some doctors is that since there is no agreement about the beginning of human life, it is therefore a private religious or philosophical decision and therefore the state and the courts can do nothing about it. This is a con. I will not presume to speculate who is conning whom and for what purpose. But I do submit that religion, philosophy, and private opinion have nothing to do with this issue. I further submit that it is a commonplace of modern biology, known to every high school student and no doubt to you the reader as well, that the life of every individual organism, human or not, begins when the chromosomes of the sperm fuse with the chromosomes of the ovum to form a new DNA complex that thenceforth directs the ontogenesis of the organism.

Such vexed subjects as the soul, God, and the nature of man are not at issue. What we are talking about and what nobody I know would deny is the clear continuum that exists in the life of every individual from the moment of fertilization of a single cell.

There is a wonderful irony here. It is this: The onset of individual life is not a dogma of the church but a fact of science. How much more convenient if we lived in the 13th century, when no one knew anything about microbiology and arguments about the onset of life were legitimate. Compared to a modern textbook of embryology, Thomas Aquinas sounds like an American Civil Liberties Union member. Nowadays it is not some misguided ecclesiastics who are trying to suppress an embarrassing scientific fact. It is the secular juridical-journalistic establishment.

Please indulge the novelist if he thinks in novelistic terms. Picture the scene. A Galileo trial in reverse. The Supreme Court is cross-examining a high school biology teacher and admonishing him that of course it is only his personal opinion that the fertilized human ovum is an individual human life. He is enjoined not to teach his private beliefs at a public school. Like Galileo he caves in, submits, but in turning away is heard to murmur, *"But it's still alive!"*

To pro-abortionists: According to the opinion polls, it looks as if you may get your way. But you're not going to have it both ways. You're going to be told what you're doing.

Roland Topor

Walker Percy's latest novel is "The Second Coming."

STATEMENT OF PROF. ALBERT WILLIAM LILEY

My name is Albert William Liley. I have been trained and hold qualifications in neurophysiology, obstetrics and neonatal paediatrics. I hold the appointment of Research Professor in Perinatal Physiology at the Postgraduate School of Obstetrics and Gynaecology in the University of Auckland, New Zealand.

For 24 years I have been engaged in clinical and research work which would be described most accurately as fetal paediatrics - the diagnosis and, where possible, the treatment of illness in babies before birth. In 1963 I developed the technique of fetal transfusion by which severely anaemic Rh babies could be transfused blood in utero to tide them over to a deliverable maturity. This procedure demonstrated clinically what was already known biologically, that the fetus was an individual quite distinct from his mother although living within her body. The fetus could be ill, could need and receive accurate diagnosis, could need and receive and respond to specific therapy just like a patient in any other age group and quite independently of maternal condition.

I consider it a bitter irony that just when for the first time the fetus arrives on the clinical scene as one who can be cared for medically there should be such sustained and strenuous effort to make him a social nonentity, as one who can be placed beyond a duty of care and protection and discarded. As a physician I would find it extraordinarily arbitrary if I were required to regard one fetus as a patient and treat and care for him properly and to deny existence, not only withhold assistance but also be an active party to the destruction of another.

The practice of fetal medicine provides an opportunity to invade fetal privacy and to observe fetal life and behaviour. In turn a knowledge of fetal life, behaviour and responses is necessary for the proper care of the fetus, the practice of fetal medicine and indeed an understanding of pregnancy physiology.

We each began life as a single cell. Fortyfive generations of cell growth or multiplication divisions were needed to reach the 30 million million cells of our adult bodies. Of these 45 generations of cell division, eight or nearly one fifth had occurred by the time we implanted in our mother's uterus, 30 or two thirds by the time we were eight weeks old, 39 by 28 weeks gestation and 41 by the time we were born. The remaining tedious four occupy the whole of childhood and adolescence and then there were no more.

This dramatic and rapid sequence of cell multiplications or replications in early intrauterine life is matched by an equally dramatic and rapid differentiation and development of structure. After a six to eight day journey down the Fallopian tube our new human reaches the uterus, his home for the next 260 days, and burrows into the spongy lining. He promptly develops a placenta and a protective capsule of fluid for himself. By 25 days from conception, about two weeks past mother's first missed period, the developing heart starts beating although two to three weeks must elapse before we can reliably detect heart beats with current technology. By 30 days baby,one quarter of an inch long,has a brain of unmistakable human proportions, eyes, ears, mouth, kidneys, liver and umbilical cord and a heart pumping blood he has made himself. By 45 days about the time of mother's second missed period the baby's skeleton is complete - in cartilage not bone at first, the buds of the milk teeth appear and he makes the first movements of his body and new grown limbs although it will be another 12 weeks before his movements are strong enough to be transmitted through the insensitive uterus to be detected by mother's sensitive abdominal wall. By 63 days he will grasp an object stroking his palm and can make a fist.

These structural changes of course are not mediated by any external agency but internally, directed by the embryo himself. In this regard the embryo with his cargo of genetic information is much more than a mere blueprint of a hew human. A blueprint is simply a plan and does not include the machinery to fulfill that plan but the embryo does. He even has the power to phenocopy himself, to reproduce asexually as about 1 in 400 embryos does in identical twinning.

However our new human has in hand other major undertaking besides his own internal organisation and development. He also develops his own life support system, his placenta, and his own confines for it is the embryo and fetus who develops his membranes, forms his amniotic fluid and regulates its volume and composition. Women speak of their waters breaking and their membranes rupturing but such expressions are so much nonsense - these structures belong to the baby. This simple point is not a play on words but a practical reality. Tests on the amniotic fluid are tests on the baby, not on mother.

However even the organisation of his own confines does not exhause the list of achievements of our new individual. His own welfare is too important to permit leaving anything to the chance cooperation of others and therefore he must organise his mother to make her body a suitable home.

First and most pressing he must prevent the menstrual shedding of the uterine lining or endometrium. He does this by producing a hormone, chorionic gondatrophin, to prolong the normally strictly limited life span of the corpus luteum in the ovary which in turn maintains the endometrium to undergo a transformation suitable for early pregnancy. This is a splendid feat of power amplification understandable in electronic circuitry and very common in physiology whereby an embryo barely out of the microgram range influences the corpus luteum in the milligram range which in turn affects the endometrium measured in grams which in turn informs mother measured in kilograms that she is pregnant. Very soon the embryo bypasses the corpus luteum and taken over direct control of the endometrium - from a very early stage of human pregnancy neither the maternal pituitary nor ovaries are necessary for its continued endocrine success.

Another crucial environmental problem which must be dealt with is the homograft situation - the fact that the fetus and his mother, invitably immunological foreigners, who would not exchange skin grafts and could not be safely given a blood transfusion one from the other, yet must tolerate each other's tissues in parabiosis for nine months of pregnancy. Again it is the fetus not mother who copes with the problem. And finally it is the fetus not mother who determines the duration of the pregnancy for unquestionably the onset of labour is normally a unilateral decision by the baby.

This relationship between a baby and his mother is clearly much more than simple biological parasitism. The term parasite so frequently applied to the fetus is often used not in the limited biological sense but with the sociological overtone of describing someone who takes all and contributes nothing. Neither sense is applicable to the fetus. True, he is parasitic on his mother for his nutritional requirements. In the same sense many wives could be said to be parasitic on their husband's income but just as wives would indignantly maintain that they contribute much to a home and marriage to justify their keep and that really what is involved is a division of labour so also does the fetus justify his keep by organising and maintaining the pregnancy. Such a relationship is more accurately described as parabiosis or symbiosis and physiologically there is no question who guarantees its success.

Even when we accept that it is the fetus who is in command of the pregnancy, that it is mother not baby who is the passive partner in the relationship, people might still feel that the fetus is nevertheless but a mindless programmed robot controlling his mother. After all the traditional view was that the fetus was some fragile nerveless vegetable blindly maturing structures in anticipation of a life and function to begin at birth. Nothing could be further from the truth. As the fetus develops structures - including sensory structure, he uses them. Development of strucutre and development of function go hand in hand. Even more important as a principle of development is the interdependence of structure and function. If the function cannot be served without developing the structure, equally without the stimulus of function the structure does not develop properly anyway.

Further, we are aware in extrauterine life that every individual represents an interaction of nature and nurture, of environment and genetic endowment. This aim is true in the uterus. The fetus does not live in a metabolic Nirvarna or in a dark and silent world in a state of sensory deprivation. The uterus may buffer, filter and distort the outside world but does not eliminate it. Stimuli do reach the body and he responds to them.

We know that fetal movement is necessary for the proper development of bones and joints, that the fetus without room to move or without muscles or nerves to move with is born with severe restriction of range of joint movements. We know that fetal comfort determines fetal position, that changes in maternal position provoke baby to seek a new position of comfort, that contractions and external palpation provoke fetal movement and the fetus will repeatedly evade the sustained pressure of a microphone or recording instrument. We know how babies change ends in the uterus while they still have room - they propel themselves with their feet,,either frontwards or backwards, and how they change sides - with an elegant longitudinal spiral roll rotating first their heads, then their shoulders and finally their legs. In early pregnancy the fetus is free to move as he pleases and does procisely that. He can turn complete flips in 1½ or 2 seconds. In late pregnancy with increasing fetal bulk and diminishing amniotic fluid volume there is less choice but fetal comfort determines which way baby will lie in late pregnancy and present in labour. Of course in selecting a position of comfort in late pregnancy the fetus may have chosen a position which is difficult or impossible for vaginal delivery. In this regard he can be accused of lack of foresight but this is a trait not unknown in adults.

Thus the fetus is responsive to touch and pressure, simple facts confirmed by any obstetrician who has ever stroked the palm of a prolapsed arm and elicited a grasp reflex or the sole of the footling breech and observed the appropriate reflex response. The fetus also responds violently to painful stimuli - needle puncture and injection of cold or concentrated solutions - stimuli which adults find painful, children will tell you are painful and the neonate to judge from his responses find painful. Critics assert that we have no proof that the fetus actually feels pain. Strictly they are quite correct. Pain is a peculiarly personal and subjective experience and there is no biochemical or physiological test we can do to tell that anyone is in pain - a phenomenon which makes it very easy to bear other people's pain stoically which is an important point for obstetricians to remember. By the same token we lack any proof that animals feel pain. However to judge from their responses its seems charitable to assume they do. Were this not so there would be no point in having organisations for the Prevention of Cruelty to Animals and I for one would be unhappy to think we would withhold from the human fetus a charitable consideration we were prepared to extend to animals.

The fetus responds to sound and light in utero. The fetus is startled by flash photography of a pregnant abdomen and with a fibreoptic conduit and photo multiplier we can detect the shadow cast by the fetus on the posterior uterine wall. In utero the light is shifted far to the red end of the spectrum and the fetus is using only his rod or low light intensity vision but if there is any light present at all there must be activation of visual pathways because single rod cells respond to single photons. The fetus lacks any images and sufficient light to practise cone vision so that at birth he can see but does not know what he is looking at. Confident recognition of images takes five to eight months of extrauterine life to acquire.

With sound it is different because intrauterine sounds have pattern and spectral composition not very different from extrauterine sounds and the fetal inner ear or hearing mechanism is of the same magnitude and therefore responds to the same frequency range as children's or adults' ears. It is easy to demonstrate fetal responses to external sound and audiometric curves may be constructed by noting changes in fetal heart rate or fetal movement or electroencephalogram to pure tones presented by hydraphone or air microphone. By this means deaf mute women may be reassured at least as early as 22 weeks that their fetus can hear. The fetus lined up under an image intensifier in a quiet room is startled by a sudden noise, human voice included. He responds to the tympanist's contribution to an orchestral performance and to the dentist's turbine drill. By halfway through pregnancy the fetus shows habituation, that is, he loses interest if the same stimulus is repeatedly presented. It is also possible to demonstrate conditioning by which the fetus given one signal can be taught to anticipate a second different one.

The fetus drinks amniotic fluid in a phasic pattern from at least as early as eight weeks gestation. By the third trimester there is a fascinating variation, some babies coyly drinking 10 ml per hour and others boozing away at 70 to 90 ml per hour. This variation correlates well with independently assessed feeding performance in the nursery. The fetus drinks more amniotic fluid if it is sweetened, less if it is given an unpleasant taste. He may get hiccups, easily recognised, and as these occur in episodic or phasic pattern and as the baby who hiccups as a fetus hiccups as a neonate usually after feeds, we suspect that they are related to fetal drinking sessions. Episodes of fetal hiccups are not randomly distributed around the clock but show a striking peak in the afternoon and evening and it is apparent that the fetus is already experiencing some circadian rhythms either of his own or exposed to mother's.

All babies are experienced in swallowing at birth and some also in suckling. In the neurological examination of the neonate the 'seeking' or 'rooting' reflex is elicited by stroking the area around the baby's mouth. He turns his head to the side of the stimulus and opens his mouth, obviously the reflex by which he homes in on the nipple. Insofar as it is very common to see fetuses lying with hands and feet in close proximity to their faces it is not surprising that they elicit a seeking reflex themselves. Therefore it is not uncommon radiologically to find fetuses sucking fingers, thumbs and toes and thumbsucking has been photographed in the nine week abortus.

Many other functions and responses could be described but always the conclusion is the same - the fetus is a young human, dynamic, plastic, resiliant. It is not simply a case of it being the same baby physically before as after birth. It is not simply a matter perhaps of a baby having the same illness before and after birth, that it is a matter of arbitration not fate whether a baby be born under Capricorn or Pisces, simply a question of whether we can care for the baby more simply and safely in the uterus or in the nursery. Rather even many little behavioural traits that distinguish one newborn from another are already apparent in the uterus. Conversely a better understanding of the fetus and his environment puts many of the problems of the neonate in a better perspective.

Of course not everyone is aware of this picture of intrauterine life. A medical social worker in the Department of Obstetrics and Gynaecology at Monash University presented to women booking in at an antenatal clinic a blank diagram of a trunk and asked them to draw on it just where they thought their baby was and what it was like at their particular maturity.She collected a fascinating assortment of amoebae, jellyfish and tadpoles located everywhere from the pelvis to the diaphragm. Such naivety is surprising but hardly alarming because it is amenable to teaching and there are many excellent books and films available as teaching aids. More serious is the attitude of people who do or should know better but chose to suppress or deny their knowledge. A Select Commission in South Australia in 1966 having to accept on the evidence before them that logically human life was a continuam beginning at conception then disarmingly remarked "However, many people simply will not accept this conclusion" and proceeded to the novel argument that criminal law should be amended to cater for popular ignorance. When we care for pregnant women and their babies, when we diagnose and treat illness in the fetus, medical and scientific knowledge is essential. When people practice abortion such knowledge is an embarrassment.

A less blatant but more persistent variant of the flat denial is seen in the use of words. Despite the time honoured use of such terms as 'quick with child' and 'heavy with child' anti abortionists are criticised for bringing children into the issue of abortion at all. You may speak of terminating a pregnancy but not of exterminating the fetus. Now pregnancy is a state and a self terminating state at that - no pregnancy goes on for ever. Sometimes in late pregnancy, with severe toxaemia, serious haemorrhage or fetal illness we would deal with the problem by terminating the state of pregnancy but not exterminating the fetus. Rather we would energetically strive and probably succeed in saving the child. Here a clear distinction is made between the pegnancy, the state, and the fetus, the entity. In the abortion argument this distinction is wilfully confused.

Others acknowledge the existence of intrauterine life but qualify it in terms which suit their purpose in destroying it. For instance one qualification or disqualification attached to our developing human is that he is incapable of independent existence or is previable. However the concept of independent existence or viability does not negate the existence of humanness of intrauterine life but simply specifies the physical conditions under which that life can continue. By the same token as a physiologist I can define quite accurately the physical conditions (and ridiculously circumscribed conditions they are) under which the life of anyone may continue. Anyone proclaiming incapability of independent existence, even in a social sense, as a forfeiture to a claim to life should think carefully the next time they plan to call a doctor themselves.

The definition of the embryo or fetus as a potential human being or human life is interesting if only because of the frequency with which it is used by doctors and biologists who probably would consider they were speaking as scientists. In the first place it is of course a non-definition - it does not tell us what an embryo or fetus is but only what it will become. But secondly, the word 'potential' is not a medical or scientific term at all but a metaphysical one. The corresponding terms in biology and medicine are growth and development and if we speak of a growing or developing human or human being or human life we have a quite different sense and we are back with reality.

In summary as a clinician and physiologist my experience leads me to agree with Sigmund Freud that human life is a continuam with a cesura at birth. I can find no reason why that life is not deserving of medical care and of protection before the law. To specify a living organism as an embryo or fetus in no way detracts from its humanness but simply designates an age and stage of life in the same sense that we would speak of someone as a toddler, an infant, a child, a teenager, an adolescent, an adult or an octagernerian.

The foregoing statement was sworn to
this 30th day of June 1981 by Albert
William Liley in my presence:

Notary Public

ooOoo

A.W. Liley

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STATEMENT OF PROF. WILLIAM A. DARITY, JR.*

Abortion as a method of fertility management, in the sense in which the demographers use the term, cannot be analyzed separately from the general thrust of population control. Techniques of birth control long have had an intimate tie with the aims and intentions of the population control movement. The function of abortion thus becomes much more than simply a private or personal matter. Abortion -- the specific set of birth control techniques that enable pregnancies to be terminated after conception -- serves a social/strategic function which only can be understood if the motives behind the population control movement are understood. These motives reside in the premises and values of Malthusian economics and the principles of "social Darwinism." It constitutes a retreat to the ideology embodied in Herbert Spencer's Social Statics and the eugenicist philosophy prevalent in the Progressive Era.

Once abortion is identified as an element in the larger context of a historic population control movement, the fundamental issue at stake can be seen plainly. It is the issue of whether or not the members of the new "elect" of society -- the professional-managerial-scientific estate -- have the right to determine directly or indirectly who among the new "unelect" should live or die.

The question of when life "begins," which has exercised so much attention, becomes peripheral or at best secondary in this broader context. It pales in importance next to the following central questions: (1) for whom will life end before its natural time, (2) precisely when will it end, (3) how will it end, and (4) who will make these first three decisions. Who is to determine the process whereby life ends? Who should have the authority over life and death in an age where we find ourselves confronted with increasingly unrestrained applications of each new "advance" in the realms of science and technology?

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*Associate Professor of Economics, University of Texas at Austin. The author gratefully acknowledges the valuable help of Mrs. Jewell Mazique and Ms. Jo Ann Noble in the preparation of this statement.

To explore the social/strategic function of abortion in depth the following themes will be examined:

1. The historic link between the population control movement dating from the early 19th century and the pursuit of improved birth control techniques.

2. The 19th century law of population, the Law of Relative Surplus Population (LRSP).

3. The 20th century law of population, the Law of Progressive Elimination of Undesirable Population (LPEUP).

4. Evidence of the genocidal tendencies of the population control movement in the 20th century.

5. Evidence of the genocidal tendencies of the application of abortion specifically in the 20th century.

6. A brief statement of positive alternatives to our present trajectory.

Pursuit of this discussion will make it evident that it is the intertwining of law and biogenetic-medical science that must be disentangled and exposed. For the longer we wait to erect barriers to the evolving tendencies reflected in the population control movement, the more difficult it will become to hold back the tide.

1. THE 19TH CENTURY POPULATION CONTROL MOVEMENT: THE HAND OF MALTHUS

Interest and research into improved techniques of birth control bear a direct relationship to the rise of the population control movement. Malthus' famous Essay on the Principle of Population (1798) had immense influence on early 19th century proponents of population control. While Malthus himself advocated the Puritanical principle of "moral restraint", his more zealous followers sought more efficient technologies that would permit intercourse without the onset of pregnancy, i.e. contraception.[1] Contraception was conceived as a means of restricting population size. Limiting population, under the aegis of Malthusian economics, was conceived further as an antipoverty strategy -- facilitating reduction of the numbers born into the working class and, correspondingly, numbers on "the dole." Malthus' friend and contemporary, David Ricardo, for example, included the following remarks in his own Principles of Political Economy and Taxation (1817):

> It is a truth which admits not a doubt that the comforts and well-being of the poor cannot be permanently secured without some regard on their part, or some effort on the part of the legislature, to regulate the increase of their numbers, and to render less frequent among them early and improvident marriages.[2]

Ricardo goes on to criticize the Poor Laws for promoting an unfortunate "multiplication" of the poor.[3] Ricardo was not referring to the welfare population in the United States in the 1970's. He was referring to the procreative practices of the English working class in the aftermath of the first Industrial Revolution. Some arguments, it seems, reappear time and time again.

From the early 19th century onward the search for new methods of contraception was directed in large part at an effort to curb the numbers of persons viewed as the excess -- viewed as the excess by those in intellectual-political domination over English society. The ostensibly humanitarian content of the population control movement had it that the poor would benefit from their own efforts to reduce their fertility by receiving greater material well-being (or higher per capita income). The trade off Classical political economy posed for the English working class was less children in exchange for more bread.

The economic basis for the Classical link between poverty and "overpopulation" was the Malthus-Ricardo doctrine of diminishing returns in agriculture. So many hungry mouths to feed was supposed to place too great a burden on the carrying capacity of the land. To avoid this fate the poor were instructed to "regulate the increase of their numbers." They could some felt (John Stuart Mill, for example) be enlightened to see that it was in their own self-interest to limit their numbers.

Promotion of birth control methods from the perspectives of feminine freedom or sexual liberation also had its advocates. But their impact was at best marginal relative to those who claimed to have found the panacea for poverty.[4]

2. THE LAW OF RELATIVE SURPLUS POPULATION

Whereas Classical political economy attributed the excess (unemployed) members of the working class to their own rapid population growth, critics of the Classical School offered an alternative perspective.[5] They argued that the basic law of population in the emerging industrial society was a Law of Relative Surplus Population -- whereby the dynamic of industrialism tended to produce a working class larger than the immediate profit-production requirements in the manufacturing sphere. The fundamental cause of redundancy among the working class was the process of technical change under the regimen of industrial society, a process that continually rendered more workers inessential to production. The Classical invocation of naturally determined limits to society's carrying capacity, i.e. diminishing returns, was mere apologetics.

The claim that the surplus population arose from the reproductive practices of the working class itself veiled the processes at work. The claim also revealed the contradictory character of the early 19th century impulse toward limiting the numbers of the poor.

The poor were the "inactive", unused,or unproductive portion of the working class and required "managing" from the perspective of those at the top of the society. Continuously unemployed workers were seen as a potential source of urban crime and unrest as well as a drain on the national treasury to the extent that Poor Laws were enacted and funded. However, what the Classicals did not grasp, while their critics did, was the necessity of the relative surplus population under industrial society. For it was this surplus pool of potential laborers who could be drawn upon in a wave of rapid economic expansion and whose presence could pressure those who had employment to perform well and with discipline.

Mercantilist thinkers who preceded the Classicals displayed an especially harsh attitude toward the working class invoking the "doctrine of the utility of poverty" which had it that low wages meant more effort. But they rarely begrudged the poor their numbers. Large numbers, they felt, meant lower wages -- which mercantilist thinkers felt was desirable.[6]

Thus there were conflicting views on population in industrial society. One view had it that the poor were too numerous and too costly to maintain. Thus it was preferable to reduce their numbers via a population control strategy. The second view recognized the necessity of the poor to industrial capital and sought to contain their anti-social behavior. What Tawney refers to as the "...grand discovery of a commercial age, that relief might be so administered as not merely to relieve, but also to deter..." was of special importance from the second viewpoint.[7] Exportation for colonial settlement, military conscription, or imprisonment were all complementary means of containing the "excessive" behaviors of the excess population.

3. THE LAW OF PROGRESSIVE ELIMINATION OF UNDESIRABLE POPULATION

The second view described above that implicitly recognized the necessity of the poor, despite its own manipulative intentions, served to limit the promotion of population control as a containment device for managing the poor. This second viewpoint was essentially pro-populationist in character. Industrial society thus bore within it two contradictory impulses on the population question during its history.

By the mid-20th century, however, the operation of a new law of population became more apparent. The limit represented by the second impulse was lifting as we moved from industrial society into a world dominated by the possesors of scientific and technical knowledge. Daniel Bell has called the new age a "post-industrial" society. There becomes less and less "reason" to keep the excess or surplus population around or supported -- however minimally.

Moreover the modern excess population is no longer an excess relative to the immediate requirements of industrial capital. Now it becomes an excess defined by the whims of a scientific-technical elite, given their vision of who belongs in the "ideal" society. Their Utopianism spurs them to separate the "desirables" from the "undesirables" on esthetic criteria. Today we find, instead of a surplus relative to production requirements, a subjectively identified "surplus". Thus a new law of population is in operation. This new law of population reveals an assault without the restraints present in industrial society on the modern "surplus" population. It is the Law of Progressive Elimination of Undesirable Population (LPEUP). Note who the modern surplus or "undesirables" have become:

1. The culturally "undesirable -- the illiterate, the uneducated, the "illegitimately" born, the "culturally disadvantaged", the poor.
2. The mentally "undesirable" -- the low IQ, the retarded, the insane.

3. The physically undesirable -- the deformed, the handicapped, the aged.
4. The racially undesirable -- the black, the red, the yellow, the brown.
5. The behaviorally undesirable -- the criminal, the street urchin, the unruly, the undisciplined, the hyperactive child.

To the extend that conditions can be identified that produce individuals who fit into the "undesirable" categories of the moment, population control strategies can be targetted to *prevent* their birth. Such persons can be stopped before they are born.

For instance it is frequently argued, as it has been at these hearings, that "unwanted" children are abused, and they in turn become abusive adults. Better, then, it has been argued to permit expenctant mothers to abort the unwanted child rather than to bring such a child into the world.

Dr. Warren Hern, a physician and epidemiologist on the national headquarters staff of the now-defunct Office of Economic Opportunity's family planning program, developed this position the *New Republic* in 1970. He cited demographer Charles Westoff's 1969 findings that approximately 800,000 to one million unwanted births occured annually in the United States and about one-half of these are to poor and near-poor parents. Still later work by Westoff and his collaborator Larry Bumpass indicated that the number might be even higher. Hern also referred to the University of Chicago's 1969 report entitled *The Unwanted Child* and Mildred Beck's 1970 *Seminar In Psychiatry* as sources that document the "tragic effects of unwantedness on the children...."[9]

Reverend Carl Fleminster, Vice President of the Harlem Interfaith Counseling Service of New York City drew the oft-invoked connection between "unwantedness" and child abuse in his statement at 1970 House hearings on family planning services:

> In addition to the psychological damage to the child, the mother, and the family, physical abuse ... often results when children are unwanted or poorly timed.[10]

The good Rev. Fleminster then prescribed prevention of "unwanted" births not only as a cure for abuse but also to reduce the numbers of children who are put up for adoption and languish in orphanages and foster homes until they reach adulthood. He said "The United States Children's Bureau and the Child Welfare League of America report that more than 300,000 children in the United States are now wards of public and private agencies." Fleminster conceded that all 300,000 were probably not "unwanted when conceived" but nevertheless asserted that "many of them were."[11]

The Bumpass-Westoff study defined "unwantedness" to mean "unwanted at the time of ... conception by one or both parents."[12] Thus they made a judgment that for a child to have sufficient love and caring, such love and caring must come from both biological parents. A further implicit judgment was made that it is irrelevant if the strength of parental desire for the child changes by the time of birth or even after birth.

Extensive research by public health scholar Dorothy Howze on the child abuse issue illuminates the pitfalls of the concept of "unwantedness." As Howze points out more recent studies have identified "unwanted" children as those whose mothers, at some stage of pregnancy, sought an abortion. Again this neglects the potential for reversal of maternal feelings toward her soon-to-be born child during the later stages of pregnancy. Howze also says that many parents have ambivalent feelings about imminent arrivals that usually are reversed favorably at the time of birth. She goes further to point out that the alleged linkage between so-called "unwantedness" and child abuse is difficult to verify statistically as is the alleged linkage between a child's own experiences of abuse and their subsequent behavior as adults.[13]

Those who seek to prevent "unwanted" children from entering the world rely upon the predictive powers of the social and behavioral sciences as a basis for identifying which offspring will be at risk of abuse at birth. It is standard fare to claim that the children of the poor and children whose parents are black are more liable to be unwanted and subjected to abuse. Available evidence, however, does not provide much support for such claims.

Four early studies on this subject generally found no evidence of a relationship between race and incidence of abuse.[14] If anything the early research on low-income families suggested a greater incidence of abuse and neglect of white children by their parents than among blacks.[15] Based upon such evidence,under the dictates of the LPEUP, reduction of child abuse by birth prevention should aim first at white poor parents.

Subsequent studies, e.g. those of Gil and Johnson, claimed that poor black parents were more likely to abuse their children.[16] The difficulty with these studies is that they were plagued by an overrepresentation of black poor parents in their samples, a problem of sample selection bias. The samples were drawn non-randomly from (a) inner city hospitals, (b) public welfare agencies, and (c) child protective agencies located in minority areas. Those who are poor and black necessarily would be more likely to interface with such agencies. A'Day and Anderson have suggested that the non-random selection of the sample leads to the mistaken conclusion that race and income correlates strongly with the likelihood of child abuse.[17]

Dick Light has gone further to point out that proportionately more middle income and upper income families go to private physicians than the poor. Private physicians are less likely to report incidents of child abuse than, for example, inner city hospitals. Reporting differences appear to be an important explanation of the more recent finding that there could be a relationship between race, income and abuse.[18]

There are four central points that emerge from this illustration of one major argument for elimination of "undesirable" population. First, the "undesirableness" of abused children hinges upon pessimistic expectations about their own adult behavior. Howze has argued that it is frequently the force of such expectations that doom people to fit into anticipated patterns. In her own research she found that the strongest predictor of the reincidence of child abuse was not race or income but the social workers' own beliefs that a new episode of abuse was bound to occur.[19] Regardless predictions are imprecise about which children are liable to become abusive parents. Second, the notion of "unwantedness" is fuzzy and subject to reversal. Its connection with the probability of abuse has not been documented with any precision either. Third, ethnicity and income are weak predictors of the likelihood of an episode of child abuse in a particular family. To prevent births on that basis is not to guarantee a reduction in the rate of child neglect or abuse. It is merely to guarantee that the number of children born into black poor families are reduced.

But the fourth point is the most telling. Suppose social science research actually had designed methods of predicting with a high degree of accuracy which type of parent will neglect or abuse a child. Would it then be justifiable to discourage such parents from having children? Where will such discouragement end? Should parents with low scores on IQ tests be discouraged from having children if social science research predicts they will be unlikely to produce a medium or high IQ child? If social scientists can identify which parents are likely to have children who will turn to crime, should they also be targeted for birth prevention?

Is the decision over life or death to be left to the predictive powers of modern science to tell us what type of person will emerge from a particular type of family? Who should decide when a child is sufficiently likely to be abused? Who should decide when a soon-to-be-born infant's anticipated deformity is likely to be too severe? Who should decide which parents should have children? Should this be a decision subjected to collective-social management, or should it be left up to the parents themselves? The advocates of population control *de facto* must make such a decision take on the former character. Those of us who oppose population control must work to insure that it takes on the latter character.

In the age of unrestrained applications of new technology, methods of birth control increasingly serve to prevent those judged to be the "wrong" sort of people from being born. With the demise of industrial society there are fewer and fewer restraints on this impulse. The ideological force of feminist urgings that women should have the right to choose whether or not to have a child - ideological forces that were largely absent at the beginning of the English population control movement - obscure the fundamental momentum associated with the application of technologies to terminate pregnancies. Without being unsympathetic to a woman's right to exercise control over her own reproductive life, one can still be disturbed by the concrete results of that new freedom - particularly if the outcome is manifested in what is being called here the Law of the Progressive Elimination of Undesirable Population.

4. GENOCIDE AND POPULATION CONTROL

The Law of the Progressive Elimination of Undesirable Population is merely a statement of the genocidal tendencies of population control. The existence of groups that contain a larger proportion of the modern "excess" or "undesirable" population will be threatened by the more extensive application of population control measures. If a group is relegated to managerial society's scrap heap, its survival becomes tenuous.

Melville Herskovits once warned blacks, when blacks still were perceived as having lost their African heritage, "A people that denies its past cannot escape being prey to doubt of its value today and of its potentialities for the future."[20] Paraphrasing Herskovits one can write today, "A people without a firm foothold in the new age of science and technology cannot escape being prey to doubt of its value today and of its potentialities for the future."

If managerial society finds any use for its outcasts or "undesirables", it will be primarily as objects of experiments. Experimental failures can then be heaped on the "unelect" before the fruits of experimental successes are distributed to the "elect."

Blacks, for example, have been used frequently as human guinea pigs. The infamous Tuskegee study, in which 431 blacks syphillis victims were left untreated for 40 years to allow medical researchers to study the effects of untreated syphillis on the human body is representative. The victims were not told that they had syphillis nor that they were part of an experiment.[21]

A California research project studying premature babies conducted in Los Angeles County Hospital in 1958-9 also is a striking example. The patients there were poor, Chicano, and black. The study sought to determine whether the provision of antibiotics "'on a routine basis'" would improve the survival rate for premature babies. It was found that babies receiving no drugs or those receiving only streptomycin or penicillin had the best chances of survival -- 4 out of 5 lived -- while 18 out of 30 receiving chloramphenicol and 21 out of 31 receiving chloramphenicol in combination died. Then a follow-up study was conducted in which six premature babies were given chloramphenicol and all of them died. The apparent reason for prolonging the study was "in order for medical statisticians to get enough cases to be significant."[22]

A third instance where blacks typically serve as guinea pigs relates directly to advances in contraceptive technology. The initial experiments for the pill and other contraceptives have been conducted first on low income black women in the United States.[23]

"Expendable" whites also will find themselves subjected to being objects of human experimentation. The abortive NIH sponsored cancer research project at Boston University Hospital, that led to the firing of its director Marc Straus, featured episodes where experiments had been performed on patients without their consent.[24]

Population control continues to be invoked widely as an antipoverty measure, carrying forward the same themes that were expressed at the turn of the 19th century. A detailed contemporary case for the use of family size reduction in the United States to counteract poverty was made in 1970 by U.S. Public Health Service statistician Arthur A. Campbell.[25]

Campbell argued that poor families' incomes are too low in large part because they have too many children. He said that high fertility among the poor relative to the more affluent portion of the population is an "important factor" in "perpetuating" poverty. Using data from 1960-65 Census Bureau surveys, Campbell found that "poor and near-poor women of child-bearing age (15-44) had an average of 153 births per 1,000 women [compared] with a rate of 98 for women in the non-poor population." Because additional survey research indicated that the poor want the same number of children as the rest of the population -- about three -- and because a fertility "rate of 98 is consistent with an ultimate family size of about three children," Campbell concluded that the difference between the poor and near-poor rate and the non-poor rate constitutes "excess" or "unwanted" fertility of the magnitude of 55 births per 1000 poor and near-poor women. Assuming a continued trend of the same level of "excess fertility" he estimated that 8.2 million poor and near-poor women had more than 450,000 unwanted births in 1966. This would constitute 36% of all births among the poverty population (poor and near-poor) and 12% of all births in the United States.

Campbell attributed the higher fertility rates of the poor to the lack of "*similar access to effective methods of contraception already available to the non-poor*." He admitted to being unable to calculate the precise amount of "excess fertility" attributable to the lack of "access to effective methods of contraception":

> The degree to which the high fertility of the poor results from restricted access to effective and acceptable methods of contraception is not accurately known....[26]

Campbell added immediately, however, that although it "is not necessarily known," it "is undoubtedly large." He argued that this is suggested by "the widespread acceptance of the poor of family planning services" offered through either public or private sources. Campbell treated family planning services as a means of allowing the poor to achieve their desired (i.e. smaller) family size as well as allow poor parents to have greater discretion in timing the births of their children.

But the core of his thesis is the argument that the control over their reproductive lives that family planning gives the poor will aid them in climbing out of poverty in two ways: (1) "it avoids the cost of providing for an additional child in the family" and (2) "it may enable the potential mother to earn money to supplement the family's income."[27]

As Campbell observed, "The costs of supporting a child vary with the number of children already in a family and the level of support chosen as the criterion of poverty." Campbell provided an example using the SSA indices for poverty. Using 1965 indices for a family of five (husband, wife, three children -- representing the generally desired family size among all race or economic status groups in the U.S.), the addition of a fourth child required $470 more for the family to avoid being "poor" and $605 more for the family to avoid being "near-poor." He added that these are somewhat "conservative-estimates." The total amount "saved" by a poor family avoiding an unwanted birth Campbell estimates would be a little less than $8,000 over an 18-year period with a discounted present value of $5,617 (using a 4% discount rate). Preventing the unwanted birth might also allow the poor woman to work longer to supplement family income. Because of the absence of day-care services, Campbell says that the birth of a child "makes it impossible for the potential mother to work for an average of four additional years." He assumes from other evidence that it would be reasonable to estimate that about one-third of the women who otherwise would have gotten pregnant would now work, i.e. preventing 451,000 unwanted births would result in 135,000 more women being able to work for four years. Campbell assumes average earnings of $2,000 per year, totaling $8,000 over the full four years, and estimated at $7,260 when discounted to the first year at a rate of 4%. "Since only 30% of the women are assumed to work the additional earnings would average $2,718 per unwanted birth avoided."[28]

Campbell's research led the Department of HEW to conclude that there are presently 450,000 families (since there are about 450,000 unwanted births annually) with four or more children now living in poverty that would not be if they only had three children to support. The Department also adds the $5,617, the estimate of expenses avoided from not having to raise a fourth child until age 18, and the $2,718 estimate of additional earnings from women enabled to work, and the average economic gain per poor family is estimated at a total of $7,795.[29]

Augmenting Campbell's analysis to support the position that family planning is a solution to poverty are statistics presented by former Secretary of HEW Elliot Richardson at the 1970 family planning hearings that indicated that "...the proportion of families below the poverty level increases markedly with the number of children in the family. The family with five or more children is about 3 1/2 times as likely to be poor as the family raising only two."[30] Richardson had the following chart inserted into the record:

Table 1. Percentage of Families Below
SSA Poverty Level By Number of Children
Under Age 18/1967
Source: Dept. 1f HEW

Number of Children	Percentage of all Families With the Same No. of Children
1	8%
2	7%
3	11%
4	16%
5	25%
6	35%

(Taken from Subcommittee: p. 89)

When Dr. Allan Guttmacher commented that, "We know...that poverty and family size are directly related," he is stating the fundamental modern premise upon which those who see population control as a solution to poverty base their position. For these individuals, the solution to poverty becomes the expansion of family planning services to poor women in their childbearing years (15-44) who currently do not have access to such programs. In 1970 the Department of HEW estimated that there were 5 million poor and near-poor women "who could probably use subsidized family planning services" but at most one-fifth of them were being reached.[32]

There are, however, some subtle difficulties with the case Campbell built in 1970. The example that Campbell developed was a comparison of the total income needs of a family with three children and a family with four to keep their family income above the poverty line. If one accepts the claim that parents want to have, at most, three children, those families that have three or fewer children, but are already poor, will plainly not be lifted out of poverty through the provision of family planning services. Their economic situation may be made more difficult by the birth of an additional child, but the prevention of the birth will not end their poverty.

Consider how deceptive the data is in Table 1. The lower percentages in the right hand column, represent the majority of poor families. Although it is true that as families become larger a greater proportion of them are poor, most poor families have 1-3 children. In effect, although a greater proportion of families with 4-6+ children are poor than families with 1-3 children, the proportion of poor families with 1-3 children constitute the clear majority of poor families. In 1966, out of approximately 2,402,000 male-headed poor families

1,400,000 had 1-3 children, and out of 1,481,000 female-headed poor families 1,006,000 had 1-3 children.[33] The poverty experienced by these families plainly cannot be ascribed to "excess fertility." Family size is not the variable that can be adjusted to lift these people out of poverty.

Neither is family size the variable that can be adjusted to lift families that have more than three children, and are poor, out of poverty. Campbell argues that if 450,000 families had one less child they would no longer be poor, but the fact is that these 450,000 families have already had their fourth child. Preventing future births may bar increases in their poverty, but even with their present family size they are still poor. Perhaps Campbell would propose that poor families with more than three children begin eliminating their "excess fertility"? Does Campbell intend to move public policy from prevention of births to infanticide among those already born?

Who, then, among the poor can population control lift out of poverty? The answer is exactly none among the currently poor, if their total income is held constant. Either poor families have 1-3 children, in which case prevention of future births prohibits family income from declining further but does not raise the family above the poverty level. Or poor families already have more than three children, in which case the same outcome applies. Family planning will leave the currently poor in poverty, if all other family income variables are held constant.

All that Campbell's analysis really suggests is that marginally nonpoor families can avoid falling into poverty by limiting their family size. It would have to be the marginally non-poor because Campbell's own estimate of "savings" of $7,795 per unwanted child prevented averages out to a not-too-spectacular $433 a year. All Campbell's analysis really says is that a marginally non-poor family can become poor if it has another child while its total income remains unchanged. It does not follow, as he infers, that a poor family will become nonpoor if it prevents the birth of another child. Nor does Campbell deal with the fact that families' decisions over how many children to have may not be motivated primarily by "economics."

It is clear that "economics" plays a large role in the motivations of those who propose that population control is a solution to the poverty problem. They are often quite explicit in their Malthus-Ricardo styled urgings that population control is the way to reduce the size of the welfare rolls. At the same 1970 family planning hearings California Congressman Paul McCloskey decried the high welfare costs in his affluent San Mateo County which he attributed to 615 illegitimate births during the previous year. He called for expanded family planning services as a solution.[34] Guttmacher chimed in at the same hearings, "...we hope that if we can have pregnancies by desire, not by chance, we will have a cutting down of welfare rolls."[35]

A year before that at the White House Conference on Food and Nutrition a panel on "Pregnant and Nursing Women and Infants," consisting primarily of several eminent physicians, prepared a working paper titled "Establishing Guidelines for the Nutrition of Vulnerable Groups (With Special Reference to Poor)." The working paper recommended mandatory abortion for unmarried girls found to be pregnant within the first three months of pregnancy and mandatory sterilization for any woman giving birth out-of-wedlock a second time. All this, at a conference which was thought by many to be devising ways to rush food to the poor and the hungry.[36] Black journalist Samuel Yette concludes grimly, "The solution to the hunger problem would not be more food to feed the hungry, but fewer hungry persons to feed."[37]

A further striking example of this trend is legislation that was introduced in 1973 by an Ohio State representative before the Ohio General Assembly which called for sterilization of welfare mothers, if they receive public aid for two or more "illegitimate" children, and sterilization of fathers who do not support minor children.[38]

Although the problem of poverty is no less severe today, the invidious thrust of population control measures apparently has had an effect on the size of families receiving cash transfer assistance. In the Washington D.C. area the regional welfare case load fell 9.5% between 1975 and 1978 according to a study prepared by Janice Outtz for the Greater Washington Research Center. Outtz said that one reason was the decline in the size of the average welfare family from four persons in 1970 to three in 1977. A Washington Post staff writer speculated that the decline was due to "the availability of publicly financed abortions under the Medicaid program that serves welfare recipients."[39]

Increased access to abortions for the poor in the 1970's coincided with a dramatic decline in the real purchasing power of the cash transfer payments they received. In the Washington D.C. area, for instance, the cost of living rose 68% between 1970 and 1978 while payments rose by only 13%.[40] Nationally the combined money value of food stamps and AFDC payments for a family of four rose less rapidly than the cost of living. Between 1974 and 1979 the real purchasing power of monthly AFDC plus food stamps fell from $520 to $478 or 8%. The state of Texas has held AFDC payments constant at $140 per month for a family of four for more than ten years![41]

What could be more genocidal than simultaneously to provide more resources for people to limit their family size while depriving them of resources that can support their children who are living? This is the "cost-effective" antipoverty policy that has evolved in an era of unrestrained application of science.

The contradictions have been quite plain for black Americans. Of the 5 million or so women in the national population whom the government identified as being "in need" of family planning services in the early 1970's, 70% were white. Yet, "...little if anything [was] being done to reach these 3,500,000 white women."[42] But for black women the opposite trend was clearly evident. As Mason observed, "It is no secret that in many communities, contraceptive services are concentrated in black communities, serving primarily blacks with little or no attention to the white poor, the middle class or the affluent."[43] Interestingly, no nationwide statistics on the racial distribution of public family planning services appear in any publicly disseminated documents.

The example of the State of Georgia is probably indicative of the pattern. At the 1970 House hearings, Atlanta physician John McCain recommended a continuation of the policy of funneling one-quarter of its family planning budget into Atlanta. He pointed out that the cost of a "satisfactory" program would be $20 million in the state, $5 million of which should go to Atlanta. The cost of a "minimum" program would be $10 million, $2.5 million of which should go to Atlanta. But the city of Atlanta with a population of about 497,000 people at the time contained about 10% of the State's population. Why, then, should it receive one-quarter of the State's family planning budget, particularly when it costs more per patient to deliver family planning services in rural areas than to urban populations?[45] It was probably more than mere coincidence that Atlanta contained one-quarter of the State's black population. What is surprising to whites is the extent to which they too have been subjected to the Law of Progressive Elimination of Undesirable Population, especially if they are poor.

Private family planning services are plainly aimed at the urban poor, whether black or white. Consider Guttmacher's words once again:

> Planned Parenthood-World Population ... is presently providing through affiliates in 182 cities, medical family planning services to low income women throughout this nation.[46]

Aiken County, South Carolina physicians were reported in 1973 to have pursued a "policy, which the doctors said was based on their social views, ... that pregnant women on welfare who have as many as three children must agree to submit to sterilization before the doctors will deliver their babies on Medicaid." The situation was publicized by the "disclosure ... that a pregnant 30-year old white welfare mother had been refused care under medicaid from the only three obstetricians in Aiken County unless she agreed to be sterilized."[47]

There can be little doubt that the poor whether white or black have been prime targets of the modern population control movement. The under class is perceived as possessing the greatest concentration of "undesirables" - hence the under class is subjected to the most intensive effort to limit the multiplication of their numbers. Former president of the South Atlantic Association of Obstetricians and Gynecologists, Dr. John McCain, applauded population control efforts in rural Georgia undertaken during the 1960's:

> ... success has been reported by Dr. Roger W. Rochat of the family planning program for the seven rural counties in Georgia which were involved in it. The white general fertility rate fell from 107.4 per 1,000 in 1960 to 80.1 per 1,000 in 1968. The Negro general fertility rate fell from 177.2 per 1,000 in 1960 to 99.5 per 1,000 in 1968. The decrease in the Negro general fertility rate was especially notable since it was nearly three times as great in all age categories as occured in seven comparably matched control counties.[48]

McCain went on to claim that these sharp drops in fertility rates are a general outcome of the provision of family planning services when he concluded that:

> Significant reductions in population growth can be obtained by family planning.[49]

Similar results were described by Dr. Joseph D. Beasley, Director of the Louisiana Family Planning Program, research and demonstration program conducted by Family Planning, Inc., after his program had been in effect for five years for the poor women of Lincoln Parish:

> From 1964 to 1968 there was a decline in indigent births of 44% in Lincoln Parish, compared to a decline of 25% in four surrounding control parishes which were similar to Lincoln in all respects except that they had no organized family planning programs.[50]

Actually they were both applauding the operation of the Law of the Progressive Elimination of Undesirable Population. They evidently had no doubts whatsoever as to whom constituted the excess population.

The penultimate expression of the sentiment guiding the law is evident in the everyday utterances of Nobel Laureate Linus Pauling. Pauling has advocated lowering the U.S. population to an "optimum" of 150 million persons. But what is to be done with the "excess" 60-70 million? An editorial writer at Howard University's student newspaper quickly drew the inference that high on the list for reduction in numbers would be blacks and native Americans.[51]

Usually portrayed as a humanitarian, Pauling points toward even more terrifying dimensions of the unfolding of the contemporary law of population. His current research concern is with the "optimum concentration" of "various natural substances" in the human body. This interest allegedly arises from a desire to manipulate levels of natural chemicals in the body ("orthomolecular medicine") to treat diseases such as cancer or mental illness.[52] But treatment of disease is only one side of the coin. The chemical composition of the body might be manipulated to destroy individuals as well.

Pauling's current research interests bridge directly into the underground world of ethnic-specific weapons. These are "chemical and biological warfare agents ... designed to exploit naturally existing differences in gene frequencies among specific population groups."[53] This could include exploitation of the absence of blood group type B among American Indians or the presence of sickle cell trait in black Americans.[54] One would hope that such weapons will never be put to use. But the tendency in managerial society is to try anything once it is known how to do it.

As suggested above the only purpose for the excess population under managerial society is to serve as subjects of experiments. This serves the dual purpose of protecting the managers from failed experiments (the excess population serves as a pool of "food tasters" for the royalty) and of providing the managers with entertainment (they can bet on the results of the experiments).

It is therefore unsurprising that an article can be found in a legitimate professional journal for lawyers advocating that various bizarre behavior modification experiments be tried out on prisoners.[55] It is unsurprising given the ideology that has developed among the members of the dominant class under managerial society.

However, those who are not fodder for human experiments will not be kept around. Many will never be born. This process will take place under the illusory conditions of "voluntary" choices over reproductive destiny. But how "voluntary" is the choice for a poor woman who is given increasing resources to prevent her from having an additional child and decreasing resources to support the children she has already? Population control conceived as voluntary, family planning services becomes an ingenious way of shifting the genocidal decision onto the shoulders of the victims themselves.

5. GENOCIDE AND ABORTION

The unequal impact of the "voluntary" choice to have an abortion is especially revealing on this last point. If blackness and illegitimacy are viewed as prime characteristics of the excess population then clearly the legalization of abortion has facilitated the operation of the LPEUP.

National data over the period 1970 to 1978 - the decade when abortion was legalized - show the consequences. In 1970 the white fertility rate in the United States was 84.1 births per 1,000 women 15-44 while the black fertility rate was 115.4 births per 1,000 women 15-44. By 1978 the white rate had fallen to 62.7, or by 25%, while the black rate had fallen to 88.6, or by 23%. While white births out-of-wedlock stayed stable at about 14 per 1,000 women in the child-bearing years, black out-of-wedlock births fell from 101.2 in 1970 to 83.3 in 1978, a 17.7% decline.[56]

More dramatic still is the apparent impact of access to legal abortions on married women's fertility rates. While white births in-wedlock fell from 120 to 95.6 (20%) over the same interval, black births in-wedlock declined from 130.9 to 99.8 (23.7%).[57] But the racially non-neutral impact of abortions on "illegitimate" births is especially notable in revealing which group has been targeted for the greatest impact. Moreover, in 1977 32% of reported induced abortions were performed on nonwhite women although they are closer to 15% of the female population.[58]

The experience of Washington, D.C. also is informative, since the city has a black population that exceeds 70% of the total. What is of special interest is the fact that the total number of abortions performed annually on D.C. residents now exceeds the total number of live births. In 1978 there were 9372 live births to District residents; in 1979 there were 9403. But in 1978 13,350 abortions were performed on District residents; in 1979 the figure was 13,611.[59] Accompanying this process has been a decline in the black birth rate among District residents from 24 per 1,000 women in the child-bearing years in 1970 to 16.5 in 1979 - a decline of 31.3%.[60]

This appears less than benign when weighed against the continued high black infant mortality rate in the District. In fact, the Washington Post recently reported that the infant death rate rose in the city in 1980 to 24.6 per 1,000 live births, 10% higher than in 1979. A declining birth rate among D.C. blacks, attributable in large measure to increased legal access to abortions, is coupled with a consistently high infant mortality rate.[61] The cumulative effect on the size of the black population in the District should be fairly evident - it will decline precipitously.

The direct role of abortion within the context of population control should be quite plain from the evidence presented here. In the last instance abortion is merely another means of hastening the elimination of the modern surplus population.

6. AN ALTERNATIVE DIRECTION

Briefly put the foregoing ought to suggest extreme caution about the government sanctioning any method that will be employed to achieve the aims of population control. There should be strong limits on the capacity of anyone besides parents themselves to decide whether or not another child is born. The judgment over who is to be born and who is not to be born should not be subject to the manipulation of those seeking to pursue an updated engenicist credo. For no one should have the power to dictate, directly or indirectly, who is "fit" to be born. Only parents should decide if another child is to be born.

The issue is in large part repealing the emerging trend evidenced by the operation of the Law of Progressive Elimination of Undesirable Population. But that is not the whole issue. The companion issue is how well is life to be lived for those who are here and those yet to be born? "Human life" legislation should not only aim at breaking the genocidal tendencies unfolding today but also should focus on the provision of needed support to parents who are raising children or expect to raise children. To as great an extent as possible the economic factor should be made minimal in importance in affecting parents' family size decisions. The ultimate aim of human life legislation should be to enrich the capacities of parents to raise more children, who are loved and happy. It is my hope that this subcommittee will begin this critical undertaking today. Otherwise tomorrow will be lost to unlimited human experimentation where those who do not satisfy elite notions of "fitness" only exist to serve as subject of the experiments, and those who cannot be used for experimentation literally will be thrown away.

FOOTNOTES

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2. David Ricardo The Principles of Political Economy and Taxation (New York: Dutton) 1973 p. 61.
3. Ibid., p. 62.
4. Langer, op. cit., passim.
5. See Juan Pablo Perez-Sainz "Basic Remarks on Peripheral Accumulation" Working Paper # 64, The Hague: Institute of Social Studies, October 1977.
6. See R.H. Tawney Religion and the Rise of Capitalism (New York: Harcourt Brace and Company) 1926 pp. 268-71.
7. Ibid., p. 271.
8. Daniel Bell "The Coming of Post-Industrial Society" (New York: Basic Books) 1976 2nd edition.
9. Warren Hern "It Doesn't Come Cheap: Family Planning and the Poor" The New Republic November 14, 1970 p. 17.
10. Testimony of Carl Fleminster in "Family Planning Services", House Subcommittee on Public Health Services, Hearings Before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 15159, H.R. 9107, H.R. 9108, and H.R. 15691 and H.R. 11123 (and identical bills) and S. 2108., Serial No. 91-70, August 3, 4, and 7, 1970. P. 289.

11. Ibid., p. 289.

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13. See Dorothy Howze Case Workers' Prognostics Judgments and Reoccurrence of Child Abuse and Neglect, Doctoral dissertation, Harvard University School of Public Health, 1980.

14. See Elizabeth Elmer "Identification of Abused Children" Children Vol. 10, 1963, pp. 180-3; B. Griswold and Andrew Billingsley "Personality Characteristics of Low-Income Mothers Who Neglect or Abuse Their Children" unpublished manuscript 1967; P. Schloesser "The Abused Child" Bulletin of the Menninger Clinic Vol. 28, 1964, pp. 260-8; and L. Young, Wednesday's Children, (New York: McGraw Hill 1964).

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17. L. A'Day and R. Anderson Fostering Access to Medical Care in Health Services: The Local Perspective (Vermont: Capital Press) 1977.

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20. Melville J. Herskovits The Myth of the Negro Past. 1941; reprint edition, (Boston: Beacon Press) 1958, p. 32.

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22. William A. Darity "Crucial Health and Social Problems in the Black Community" Paper presented before the Black Caucus of Health Workers, APHA, at the 100th Annual Meeting of the American Public Health Association, Atlantic City, November 4, 1972.

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24. "Cancer Research Data Falsified; Boston Project Collapses" *The Boston Globe* June 29, 1980 p. 1.

25. Arthur A. Campbell "The Role of Family Planning in the Reduction of Poverty" in House Subcommittee on Public Health Services, op. cit., pp. 185-97.

26. *Ibid.*, p. 185-6.

27. *Ibid.*, p. 192.

28. *Ibid.*, p. 192.

29. *Ibid.*, p. 192.

30. Elliot Richardson's testimony in House Subcommittee on Public Health Services, op. cit., p. 78.

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44. John McCain's testimony, House Subcommittee on Public Health Services, op. cit., p. 273.

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Some Reflections on the Human Life Bill

by

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Dr. Leon E. Rosenberg

Dr. Leon E. Rosenberg of Yale University School of Medicine testified, April 24, 1981, at a Senate subcommittee hearing on proposed anti-abortion legislation, that he knew of no scientific evidence bearing on the question whether actual human life is present in the foetus before the foetus is viable. Several other physicians had previously testified that in their judgment there is scientific evidence indicating a significant likelihood that actual human life is present in the human foetus from the moment of conception. How can one account for such a striking disagreement between scientists examining the same evidence?

Such a disagreement arises because of a difference in the interpretation of scientific evidence; and the difference in the interpretation depends on the philosophical position taken by the interpreter.

If the scientist follows a natural, "common sense" philosophical approach -- one that holds that we can make dependable, rational judgments about the nature of things if we base such judgments soundly on the evidence made known to us through our sense experience -- he will quite readily interpret the scientific evidence available in the present instance as indicating a "significant likelihood" that actual human life is present in the fertilized human ovum.

But, if the interpreter (such as Dr. Rosenberg) wishes to take an ultra-sophisticated philosophical view of the interpretation of the same scientific evidence, he may withhold his assent to the presence of actual human life in the foetus right down to the moment when the foetus is viable. And if the interpreter wishes to continue abortive practises he may build up a defense of such practises by adopting such an ultra-sophisticated philosophical view on the interpretation of the scientific evidence.

Dr. Rosenberg in his testimony before the Senate subcommittee hearing made no reference to the above-mentioned philosophical difference. Instead, he states that the difference is a matter of "religious feelings." He declares: ". . . scientists, like all other people, have religious feelings to which they are entitled. In this instance [i.e., the scientists who hold that human life is present from the moment of conception], I believe they have failed to distinguish between their personal biases and their professional scientific judgments." It may be noted that Dr. Rosenberg is implying that he speaks without any personal bias -- that he speaks from a purely professional point of view.

In answer to Dr. Rosenberg it must be said that there is much more than "religious feelings" in the judgment of so many scientists and physicians that actual human life is present in the fertilized ovum from the very beginning. There is an interpretation of the scientific evidence -- an interpretation which follows a natural "common sense" philosophical approach that we can make dependable, rational judgments about the nature of things, basing our judgments on the evidence made known to us through sense experience. It is in following this natural, "common sense" philosophical approach that these scientists interpret the scientific evidence as indicating the strong likelihood of the presence of actual human life in the foetus from the very beginning.

But Dr. Rosenberg also follows a philsophical approach in his interpretation of the scientific evidence; he does not speak as a pure scientific professional. He speaks as an interpreter with an ultra-sophisticated philosophical bias when he declares that there is not "a single piece of scientific evidence" bearing on the question of when human life begins. What is the philosophical position taken by Dr. Rosenberg?

It appears to be the extreme "positivist" position adopted in the 1930's by certain European figures, including the group called the "Vienna Circle," and also a group of English "philosophers of language," one of the best known of whom was (and is) Alfred J. Ayer. Dr. Rosenberg uses the expression, "religious, metaphysical notions," and he characterizes religious convictions as "religious feelings." This manner of speaking fits in perfectly with the position taken by the above-mentioned philosophical figures.

According to the extreme positivist approach, human knowledge is strictly limited to what can be observed by the senses and by sense-instruments such as microscopes and telescopes. Anything beyond sense knowledge is said to have "emotional meaning" as distinguished from "scientific meaning." Included in the "emotional meanings" are all moral principles, the notion of moral good and evil, and all statements about the nature of reality beyond what can be observed by the senses. Even scientific theories are regarded as merely convenient formulae having pragmatic usefulness in predicting future observable sense phenomena. Scientific theories tell us nothing about the structure of a supposed orderly world of natures acting in accord with natural laws. They do not even provide a reasonably probable analogy of how such an orderly world is constructed and operates. Indeed the very existence in reality of such an orderly, unified, intelligible world is classed among the "religious metaphysical notions."

Pressed to declare when he would begin to protect life in the uterus, Dr. Rosenberg replied, "At the point of viability, at the point the human being can exist on its own outside the uterus." One wonders how he would define such "human being." From the philosophical standpoint of extreme positivism he would be limited to describing the observable sense phenomena associated with human life. If he admitted the existence of a "human being" beyond the sense phenomena he would be using a "religious, metaphysical notion."

This much is quite clear: the difference between Dr. Rosenberg's views and the views of the scientists who disagreed with him at the Senate subcommittee hearing is not a difference between a "professional scientific attitude" and an "attitude influenced and biased by religious feelings;" it is the difference between two philosophical approaches to the scientific evidence, one of these being the natural, "common sense," philosophical approach -- the other, the ultra-sophisticated philosophical approach which rejects the possibility of any valid human knowledge beyond the level of the senses. This latter philosophical approach forbids us to discuss moral good and evil on the grounds of rational judgment based on evidence, but reduces questions of moral good and evil to matters of emotional preference -- "feelings." This latter approach reduces science itself to the level of a collection of observations of the sense level and it regards scientific theory as merely pragmatically useful, not as true knowledge of an existing, unified, intelligible cosmos.

If Dr. Rosenberg maintains that he is not an extreme positivist of this kind, then he might be asked to make explicit the philosophical position he does hold -- the position from which he characterizes the judgments on foetal life held by his scientific colleagues as "personal bias" and as "religious feelings," the position from which he dismisses their carefully considered rational judgments as "religious, metaphysical notions."

A final reflection might be added on the position taken by Dr. Rosenberg, and by all who seek to justify abortive practises on the basis of a declared ignorance of whether or not there is actual human life in the foetus. All who take this position might be asked: Are you not seek‹ing› to justify an act that may be destructive to actual human life? Even the ultra-sophisticated philosophical approach of extreme positivism does not remove this question (unless the whole matter of the destruction of actual human life is cynically cast aside as one of mere emotional preference). The question can hardly be dismissed as trivial or unimportant, especially when so many distinguished and respected scientific colleagues express their rational conviction that there is a significant likelihood of the presence of actual human life from the beginning of foetal existence. Does the question not raise most serious qualms even for the positivist? Even on purely humanistic grounds?

Planck and Einstein

The positivist interpretation of scientific evidence is discussed in depth, historically and analytically, by Stanley L. Jaki, in the Gifford Lectures of 1975-75 and 1975-76, published by the University of Chicato Press, in 1978, under the title, The Road of Science and the Ways to God. Jaki reports the rejection of anything like a positivist interpretation of science on the part of all the great scientific figures of the nineteenth century. In his discussion of the twentieth century Jaki dwells in detail on the persistent refusal of the two great scientific figures, Max Planck and Albert Einstein, to accept a positivist interpretation of their work, even though much pressure was exerted (especially on Einstein) to win them to the positivist view. The fact that neither Planck nor Einstein adhered to any religious faith would indicate that their anti-positivist position was not based on any particular religious bias. Both Planck and Einstein might be called "religious," however, in that they both respected and stood in awe of the mystery of the physical cosmos, the structure and activity of which they had made the aim of their entire life's study. They refused to look upon that majestic orderly cosmos as a subjective product of their scientific imagination, and upon their theories about that cosmos as being only pragmatically useful. They were both deeply convinced that their theories applied to a really existing cosmic order, and described that order, not exhaustively and finally, but as legitimate analogical approaches to an endlessly impressive physical reality which would continue to challenge and to strike with awe the scientific geniuses who would follow them.

James J. Kilpatrick

In the Saturday, May 4, 1981 edition of The Springfield (Mass.) Morning Union, James J. Kilpatrick devoted a column to the April 24 subcommittee hearing. Mr. Kilpatrick is not at all sympathetic to the aims of the Human Life Bill, but he mentions two points which are worth reflection. The first of these is true in what it affirms but hardly true in what it denies. Mr. Kilpatrick states: ". . . the question of 'when human life begins' would appear to be a question primarily for theologians and metaphysicians, and not a question for senators . . . ." It is certainly true that the question "when human life begins," demands a basic theological and metaphysical approach to the abundant scientific evidence. But this does not mean that senators are excluded from considering and answering the question, any more than it excludes scientists. What it does mean is that scientists, senators, or any intelligent person who studies the question seriously must bring to its solution a philosophical approach and a theological position. To reach the answer given by the panel of distinguished scientific witnesses who maintained that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception, there is required a common-sense metaphysical philosophical approach such as the one mentioned above, and a theological position to the extent that the very possibility of an orderly and intelligible world of natures is not ruled out because of the refusal to accept the existence of an intelligent creator. Simply stated, all that anyone needs in the way of metaphysics and theology is a common-sense approach to evidence and the absence of an anti-theological bias.

The second point brought up by Mr. Kilpatrick treats the question of the intention of the framers of the 14th amendment, the amendment on which the sponsors of the Human Life Bill seek to base the constitutional character of the Bill. Mr. Kilpatrick writes: ". . . the notion that the framers of the 14th amendment meant the word 'life' to embrace a foetus at the microscopic age of one split second is a harebrained notion if there ever was one." I would suggest that when the framers of the 14th amendment employed the word, "Life," in their wording of the legislation, they employed it absolutely as meaning "the life of human persons." They would not need to have explicitly in mind the full extent of the meaning of this expression. It would indeed be "harebrained" to expect them to be in possession of the scientific knowledge of a much later date. But this does not exclude from their intention the protection of human life wherever or whenever it exists. The precise point of the Human Life Bill is that since present-day scientific evidence indicates the significant likelihood that actual human life exists from conception, the 14th amendment as it is written does cover the life of the foetus from the first movement of conception. I do not think it is "harebrained" to hold that the framers of the 14th amendment who wished to protect all human life, would extend that protection to the life of the foetus in the womb if they had lived today and listened to the testimony of the scientists with the basic metaphysical and theological presuppositions mentioned in the last paragraph. I do not deny that some of them might follow the ultra-sophisticated metaphysical (epistemological) approach of the extreme positivists; but I am convinced that they would have to do violence to the natural common-sense orientation of their rational nature to do so. Nor do I deny that some of them might foster a strong anti-theological bias in their approach to such questions -- for whatever reasons; but I am not ready to demand that all consideration of scientific evidence must be filtered through such an anti-theological bias if it is to retain its authentic scientific character.

The traditional American separation of Church and State does not mean that we must all become anti-theological, anti-common sense positivists. To hold such a position would not be separation of Church and State, it would be a union of anti-Church and State, a union of anti-theology and State, a union of anti-common sense philosophy and State. We can still be common-sense philosophers, and believers in God, and at the same time act and think like good scientists, good senators, and good American citizens.

Dr. Rosenberg Again

Might it not be argued that it is reasonable to say, with Dr. Rosenberg and many others, that there is merely potential human life present in the foetus from the beginning? Is it not a "common sense" position to say with Dr. Rosenberg: "While conception is a critical event in human reproduction, the fertilized human cell has only the potential for human life. To fulfill this potential the fertilized egg must travel to the uterus, be implanted in the uterine wall, and undergo millions and millions of cell divisions leading to the development of its head, skeletal system, limbs and vital organs."

Is not this a "common-sense" position? Does it not describe accurately what actually takes place in foetal development? Indeed, it does; but it does not establish the position that the fertilized human cell has only the potential for human life. Actually, the process which Dr. Rosenberg thus summarily describes points to the very opposite of the position he espouses: as scientific evidence it indicates a significant likelihood that actual human life exists from conception.

To understand why this is so, one must consider an ambiguity in the meanings of the term "potential." The term "potential" may be taken in two different senses. (1) It may be taken in a purely passive sense to signify that which is not actually present but which may be constructed or produced out of materials which are actually present -- the materials not entering into the activity of producing or constructing, but only receiving a position or determination from an active power outside themselves. An example would be the bricks or other building materials which are the passive elements that enter into the construction of a building: the building materials have only the potential to become a building. Here "potential" is used in the purely passive sense of the term. (2) The term "potential" may be taken in a sense which is not at all purely passive, but signifies a potential, or power to act, and implies the presence of a nature whose active potential it is. Examples might be: the power of speech, power of locomotion, powers of external sensation, of thinking or choosing, or the power of a living organism to assimilate food, to grow and to reproduce in its kind. All such active potentialities or active powers are indicative of the actual presence of the nature whose powers they are. Here the term "potential" is taken in an active sense.

When Dr. Rosenberg speaks of the foetus as having only a "potential" for human life, and when he then goes on to summarily describe the process of foetal development from conception to completion, he fails to take into account the two senses of the term "potential" -- he speaks as if one implied the other. He speaks as if the passive sense, which means the absence of the actual whose potential it is, implied and contained the active sense, which means the activity of powers belonging to a nature actually present.

The active power or potential to produce the many steps of foetal development indicates the presence of life -- of the specific kind of life needed to produce that specific kind of foetal development. The foetal development is by no means a merely passive reception of positions and determinations from outside, like the building of a house; it is a development that takes place as actively ordered and directed from within, through the exercise of actual powers proper to the specific and individual life already present. Whenever there is foetal development it is guided and directed from within. Thus, if there is to be foetal development, the individual living being must be present from the beginning.

Thus, if we are to look at the development of the human foetus after the analogy of the building of a house, we must picture the builder as building his own house from within, using materials but transforming them into his own life as he builds. We must picture the builder building a living organism through which he will exercise the many other human powers that can only be brought into play through the instrumentality of the head, brain and nervous system, the skeletal system, the limbs and the vital organs, to which Dr. Rosenberg refers. Can a reflective observer of all this marvellous development from within -- an observer whose own life has been given to him in the same way -- remain unmoved before such a mystery? Can he take upon himself the authority to directly destroy this gift of developing human life?

Brigham Young University
J. Reuben Clark Law School

RECEIVED
SENATOR GARN
MAY 20 12 30 AM '81

May 19, 1981

Senator Jake Garn
United States Senate
Washington, D.C. 20510

Re: Proposed Human Life Bill

Dear Senator Garn:

I am an Associate Professor of Law and teach at the J. Reuben Clark Law School of Brigham Young University. I have done extensive research and writing on the subject of abortion. I am deeply troubled by the doctrine of abortion privacy which the Supreme Court has spawned, and I strongly favor a substantial change in constitutional law to correct the excesses and abuses which Roe v. Wade has generated.

Recently, I was invited to sign a letter in support of the so-called Human Life Bill(s) now being considered by Congress. Despite my complete agreement with the objectives of such legislation, and my respect for the other law professors who, I have been advised, have agreed to sign the letter, after reviewing the matter carefully I have concluded that (1) I cannot in good conscience sign that letter, and (2) the key part of Human Life Bill(s) currently under consideration is unconstitutional. However, I believe that parts of the present Human Life Bills are constitutional, desirable, and, if enacted, would be upheld by the United States Supreme Court.

I enclose for your information a copy of the memorandum which summarizes my evaluation of the matter. I hope that you will find it to be helpful.

Very truly yours,

Lynn D. Wardle

Lynn D. Wardle
Associate Professor of Law

LDW/ljf

Enclosure

Associate Professor of Law
Lynn D. Wardle
May 19, 1981--Provo, Utah

A BRIEF EVALUATION OF THE CONSTITUTIONALITY AND DESIRABILITY OF THE HUMAN LIFE BILL(S)

The proposed Human Life Bills (H.R. 3225, S. 158 and H.R. 900) as I understand them contain, essentially, the same four parts:

(1) The finding and declaration of Congress that human beings exist from the time of conception.

(2) The finding and declaration of Congress that the Fourteenth Amendment was meant to protect all human beings.

(3) The declaration, ostensibly under the authority of Section 5 of the Fourteenth Amendment, that the term "person" as used in the Fourteenth Amendment includes all human beings.

(4) An express withdrawal of jurisdiction from lower federal courts to issue injunctions in cases involving abortion laws.

The objectives of a Human Life Bill (H.L.B.) are laudible. The purposes of the legislation, as outlined in the Galebach article, are very worthwhile. But in my opinion, a Human Life Bill in the form just described would not be entirely constitutional, nor is it entirely desirable.

Constitutionality

Part 1 of the bill as described above would be constitutional. It is within the power of Congress to make a finding regarding when human life begins. The Galebach article provides strong support for this view. Indeed, dicta in Roe v. Wade supports the argument that Congress is the most appropriate governmental body to address this question.

Part 2 of the Human Life Bill would probably be constitutional. This is the position that Professor Witherspoon has taken from the very beginning. Historically it may be correct (though this is less than clear, since many classes of human beings have not received the protection the declaration claims was always intended to be provided by the Fourteenth Amendment). It would not be inappropriate for Congress to investigate this question and reach this finding, even though it would appear to contradict the rationale of several Supreme Court decisions. As a mere finding (not binding on the Court) it would be an appropriate exercise of Section 5 power under the Fourteenth Amendment.

The fourth part of the Human Life Bill, also, would be found constitutional. Congress has the constitutional authority to restrict the jurisdiction of lower federal courts--or to abolish them all together. It is possible that this particular jurisdictional restriction could be found to violate another provision of the Constitution (e.g., equal protection clause) but I doubt it. However, I have not researched this point thoroughly. It is noteworthy that under this section the federal courts would retain jurisdiction to grant damage and other relief in abortion cases.

Part 3 of the bill, however, the operative definition of "personhood", is probably unconstitutional. It is an unlawful attempt by Congress directly to overturn by statute an explicit interpretation of the Constitution made by the Supreme Court.

In *Roe v. Wade*, the Supreme Court specifically held that the term "person" as used in the Fourteenth Amendment does not include the unborn. That point was made whole and complete in itself. Contrary to the implication of Galebach, that holding was *not* predicated or contingent upon a prior finding that the Court did not know when human life began. In fact, the court did not address the question of when human life began until *after* it had separately analyzed and specifically concluded that the unborn are not "persons" protected by the Fourteenth Amendment.

In *Roe*, the Supreme Court first declared that one of the "liberties" constitutionally protected against state infringement by the Fourteenth Amendment is the right of privacy which "encompasses a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Finding this to be a "fundamental" constitutional right, the Court declared that state laws infringing upon this right can not be sustained unless they are necessary to effectuate a compelling state interest.

Having clarified the standard of judicial review, the Court then proceeded to determine whether the states had a "compelling" state interest to support abortion restrictions. The first argument it considered was that the unborn were "persons" and that states had a compelling interest in protecting their lives. The Court noted:

> The Appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. *In support of this, they outline at length and in detail the well-known facts of fetal development.* If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.

Id. at 157 (emphasis added). The Court, however, directly rejected this argument and concluded that the unborn are not "persons." In reaching this conclusion, Justice Blackmun, who wrote the opinion for the Court, (1) analyzed the text of the Constitution and the usage of the word "person" therein, (2) referred to the history of less restrictive abortion practices throughout the major portion of the nineteenth century (when the Fourteenth Amendment was enacted), and (3) noted that its conclusion that the unborn are not constitutional "persons" was in accord with the results reached by state courts and lower federal courts that had addressed the issue.

Thus, the Supreme Court clearly addressed the question and explicitly concluded that the unborn are *not* "persons" under the Fourteenth Amendment. I simply do not believe that many federal courts, and certainly not a majority of the Supreme Court, would conclude that Congress has the authority to override by simple legislation an explicit interpretation made by the Supreme Court of a term used in the Constitution (or in an Amendment to the Constitution). The final authority of the Supreme Court to interpret the Constitution has been recognized for 178 years. *Marbury v. Madison*, 1 Cranch 137 (1803).

In Roe, the Court went on to consider whether there were any other potentially "compelling" state interests that would justify criminal abortion prohibitions. The Court examined two primary arguments: (1) that the state's interest in protecting maternal health is compelling justification for abortion restrictions, and (2) that even if the unborn are not persons they are at least human beings and the state interest in protecting the life of human beings is compelling. The latter point is particularly relevant to an H.L.B. The Court concluded that this interest (human life) was not compelling throughout pregnancy, but it became a compelling interest after viability. The Court noted "we need not resolve the difficult question of when life begins." 410 U.S. at 159. It referred to the "wide divergence of thinking on this most sensitive and difficult question." Id. at 160. Justice Blackman's opinion summarized (in scandalously inept fashion) the differing religious viewpoints on when "life" begins, alluded to one current medical theory (that conception is a "process" rather than an "event"), and briefly reviewed the treatment of the unborn in the law (summarizing with the well-known declaration that "the unborn have never been recognized in the law as persons in the whole sense.").Id. at 162.

After all of this, Justice Blackman concluded:

> [W]e do not agree, that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving the health of the pregnant woman ...and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct, each grows in substantiality as the woman approaches term and at a point during pregnancy, each becomes "compelling."

Id. at 162, 163. Based on this, Justice Blackman set down his now infamous three-stage model of constitutional abortion regulation.

The points to remember from this review of Roe v. Wade are: (1) that the Court squarely addressed the issue of "personhood" of the unborn and concluded that the unborn are not persons and that the argument that they are persons cannot constitute a compelling state interest to justify criminal abortion laws; (2) that the Court concluded that it did not know when human life began, and that in view of the controversy surrounding that question, both contemporaneously and historically, the state interest in protecting prenatal human life was not a compelling state interest until after the point of viability. The Court hedged the second point, but not the first.

Thus, for Congress to declare that all unborn humans are "persons" within the meaning of the Fourteenth Amendment would directly contradict an interpretation made by the Supreme Court. The attempt by Congress to override a Supreme Court constitutional decision by the mere expedient of enacting legislation would create a controversy in which the issue of judicial supremacy would supercede the substantive "personhood" issue.

Finally, it must be noted that while the other parts of the Human Life Bill, by themselves, probably are constitutional, they might not be upheld if the constitutionality of those provisions was considered at the same time and in conjunction with an examination of the constitutionality of the "personhood" part. Analysis of the latter could "sour" the analysis of the former.

Desirability

I suggest that a Human Life Bill which only makes the express declaration and finding of Congress that human life begins with conception would do the most good, and cause the least damage.

First, such a provision would be clearly constitutional.

Second, such a provision would "set up" the abortion issue in excellent fashion. For once the people--in the country at large, or decision-makers (e.g., members of Congress)--begin to analyze the question in this fashion and acknowledge that human life begins at conception, then the next step--to provide legal protection for that dependent form of prenatal life-will be much easier to take.

Third, inasmuch as the Supreme Court specifically acknowledged that the treatment in law of the unborn and the matter of when life begins are relevant to the question whether there is a compelling state interest to justify abortion restrictions, it is possible (though, given the present makeup of the Supreme Court, doubtful) that such a finding, alone, could provide the basis for a conclusion that now there is a compelling state interest for abortion restrictions. That compelling state interest would be the finding and consensus, expressed by the elected representatives of the people in the Congress of the United States, that the unborn are indeed human beings from the point of conception.

Fourth, this action would clearly show the strength of Congress and the foolishness of the Court. As a direct response to the Supreme Court's whimpering, unpersuasive, and oft-criticized disclaimer that "we don't know and it doesn't look like anyone really knows when life begins," would be the forthright declaration of Congress that human life begins at conception.

Fifth, the opinion in Roe v. Wade has been an embarrassment to the Court and to the legal profession since Justice Blackman announced it. The action by Congress would call attention to one of the most embarrassing and deficient parts of that opinion. This could motivate the Court to reconsider the result and rationale of Roe. If the Supreme Court is going to reverse or modify Roe in the near future, the public embarrassment from the aforementioned contrast could provide as much an incentive for the Court to act now as anything else. Indeed, it would provide a convenient opportunity for the Court to abandon this "derelict on the waters of the law" and to do so without having to reverse itself. It could neatly say that, in light of this new development, the Court should reconsider Roe.

Sixth, for Congress to go further, however, to expressly declare that the unborn are "persons" under the Fourteenth Amendment would put the matter on an entirely different footing. The principle of judicial supremacy would, in that case, emerge as the predominant issue (especially in the eyes of a court called upon to judge the constitutionality of such statute) and the correctness or absurdity of the rationale of Roe v. Wade would drop into a secondary, almost irrelevant, position.

Seventh, if either the third (intent of Fourteenth Amendment) or the fourth (judicial jurisdiction) parts of the Human Life Bill outlined above were enacted, it could raise (at least in popular debate) profound questions about the balance and separation of powers and about judicial independance. If pushed, those issues, I am convinced, also would predominate in the public debate and the crucial substantive questions of whether Roe v. Wade is good law, when human life begins, personhood, abortion, etc., would become obscured in a cloud of serious controversy about fundamental principles of constitutional politics. I do not believe that we can afford to have public attention diverted to such procedural issues.

Eighth, I have a few questions about the draftsmanship of the bill, particularly the definition of "a human being" on lines 21 and 22 of page 2 of H.R. 3325, which is incorporated in the definition of "person". What all that has to do with Roe v. Wade, I am not sure.

Ninth, I don't think that the declaration of "personhood" can be salvaged by saying that it is merely an advisory, legislative finding. By its terms, the "personhood" declaration is made operative, enforceable law. Thus, it directly challenges the Supreme Court's operative interpretation.

Finally, I think that the three objectives of the pro-life movement at this time must be: (1) to reverse Roe v. Wade, which effectively amended the Constitution to mandate national legalization of abortion on demand; (2) to provide at least minimal (and eventually total) protection for the lives of unborn children; and (3) to control the growth of the substantive due process doctrine of "privacy" which has led to egregious judicial rulings regarding a constitutional "right to die," "substitute judgment" etc. as the direct analytical progeny of Roe v. Wade. I do not think that all objectives need to be achieved by constitutional amendment; in fact, I do not think that a constitutional amendment is desirable to achieve all three objectives. But clearly an amendment is both necessary and sufficient to achieve the first objective--to reverse Roe v. Wade. That can only be done by a change in constitutional law; i.e., only by the adoption of a constitutional amendment or the modification of Roe v. Wade by subsequent Supreme Court decision.

Achieving that objective must take priority now. That is why I object to the futile effort of Congress to adopt a Human Life Bill which includes an attempted Congressional "reversal" of the Roe v. Wade "personhood" holding. In my opinion, not only will that effort ultimately fail, but it will bring into disrepute the pro-life movement, casting doubt on the judgment of pro-life leaders and the propriety of their methods, and stimulating fears that pro-life advocates and legislators are irresponsible Constitution-wreckers. The loss of credibility that the pro-life movement would suffer when the principle of judicial supremacy in interpreting the Constitution was resoundingly reaffirmed, and the main part of a Human Life Bill was disgraced by a persuasive, clear, patriotic opinion (possibly written for a unanimous Supreme Court) could set the pro-life civil rights movement back irreversibly (in this decade) in the political arena. Thus, I recommend that the Human Life Bill presently under consideration be amended before adoption by, at least, deleting the "personhood" declaration currently contained therein.

The Case of the Unborn Patient

GEORGE F. WILL

A character in a John Updike novel says, "Life, that's what we seek in one another, even with the DNA molecule cracked and our vitality arrayed before us as a tiny Tinkertoy." But as science explicates the chemistry of life, many people flinch from some facts. They seek not life but reasons to deny that some life exists. They sense, I think, the moral incompatibility between some facts of modern science and some practices of modern society.

Recently a boy underwent brain surgery six times in the nine weeks before he was born. An ultrasound scan in the 24th week of gestation revealed hydrocephalus, a damaging concentration of fluid in the brain. A hollow needle was inserted through the womb, into the fetal skull to the fluid. Nearly a quart of fluid was drained in six operations.

Prenatal medicine can detect and treat various forms of fetal distress and genetic problems, with the help of ultrasound pictures that can show all fingers and heart chambers at eighteen weeks. A fetus's inability to assimilate an essential vitamin has been detected and treated by giving large vitamin doses to the mother. Babies likely to be born prematurely can receive drugs that hasten maturation of the lungs, thereby combating hyaline membrane disease, a killer of premature babies. Drugs such as digitalis can be delivered to a fetus through the mother's bloodstream to correct irregular heart rhythms. Excess fluids have been drained from the chests and abdomens of fetuses, and blood transfusions have been given to fetuses.

Rights: Prenatal medicine should raise troubling thoughts in a nation in which abortion is the most frequently performed operation, a nation in which last year 1.5 million abortions ended about one-third of all pregnancies. Science and society are out of sync. The most humane of sciences, medicine, can now treat as patients those who the law says lack an essential human attribute: rights. Mothers can kill any fetus that medicine can treat.

This is not widely understood. Some defenders of the Supreme Court's 1973 abortion decision may have been so busy applauding it that they have not read it. The New Republic recently praised the decision as "fair," explaining it this way: "Abortions are freely available in the first trimester, subject to medical determination in the second trimester, and banned in the third, when the fetus is viable." But the Court actually decreed that there can be no serious impediment to even third-trimester abortions. It said that even in the third trimester states cannot prevent any abortion deemed necessary to protect a mother's health from harm, and that harm can include "distress."

There is, effectively, abortion on demand at every point. So just as prenatal medicine was beginning to produce marvelous life-saving and life-enhancing achievements, Supreme Court Justices made it the law of the land that the patients for such medicine have no right to life.

Not surprisingly, some pro-abortion forces are increasingly anti-scientific, in the name of "humility." They say: let's all be properly humble and admit that the matter of when human life begins is a mystery beyond our poor power of understanding, so the answer "birth" is no more arbitrary than any other. This argument is too anti-scientific, and too convenient to the pro-abortion position, even to seem ingenuous. It has aroused Walker Percy, an M.D. and a novelist of distinction. He notes that it is a commonplace of modern biology that the life of an organism begins "when the chromosomes of the sperm fuse with the chromosomes of the ovum to form a new DNA complex that thenceforth directs the ontogenesis of the organism," producing the undeniable "continuum that exists in the life of every individual from the moment of fertilization of a single cell." Percy adds:

The argument about abortion cannot be about when human life begins.

"The onset of individual life is not a dogma of the church but a fact of science. How much more convenient if we lived in the thirteenth century, when no one knew anything about microbiology and arguments about the onset of life were legitimate . . . Nowadays it is not some misguided ecclesiastics who are trying to suppress an embarrassing scientific fact. It is the secular juridical-journalistic establishment."

Stephen and Amanda, Australian twins, were conceived in vitro. Two eggs were fertilized in a laboratory and implanted in the mother, who wanted twins. Perhaps the status of life begun in vitro is unclear prior to the implantation that is necessary for the continuum. (Necessary today but perhaps not tomorrow, when there may be artificial wombs.) But little Louise Brown in England is famous because she is the first child whose *life* began in vitro.

Agenda: In 1947, before Planned Parenthood became a pro-abortion lobby, an officer referred to the being produced by fertilization of an ovum as "the new baby which is created at this exact moment." In 1964 a Planned Parenthood pamphlet said, "Aoortion kills the life of a baby, once it has begun." What has changed is not biology but Planned Parenthood's agenda.

In 1973 the Supreme Court, feigning humility as it arrogantly legislated, said it could not "resolve the difficult question of when life begins." Actually, the Court knew what every high-school biology student knows. So it quickly inserted the telltale adjective "meaningful." It defined viability as the point at which the baby can have "meaningful" life outside the womb. Speaking of such life recently at a Phoenix abortion center, a woman in her second trimester was injected with a saline solution and sent home. Three nights later she went into labor and was told to go to the hospital to "deliver the fetus"—dead, of course. Instead, she delivered a live girl.

The argument about abortion cannot be about when human life begins. It must be about the status of life at various early stages—a matter about which decent people can disagree. But denial of elementary biology is the way some pro-abortionists duck the difficult issue of gradation. However, whatever one thinks should be the status of the life that exists at conception, surely any civilized sensibility should be troubled by the status of life later in pregnancy. Then a mother need not treat as human a being that prenatal medicine can treat as a patient, a being that can become, if the attempt to kill it fails, a pediatrician's patient.

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DEPARTMENT OF PHILOSOPHY

518 Northfield Drive
Youngstown, New York 14174

April 24, 1981

U. S. Senator John East
Senate Office Building
Washington, D.C.

Dear Senator East,

I would be hesitant to boast of the importance of the enclosed material, but the hour is late in terms of your present hearings on the question as to when human life begins and, I honestly believe, this article could prove an invaluable aid in resolution of certain key questions which have arisen.

The natural scientific evidence is already in -- and its content clear. What is not so clear is the rational meaning of that evidence. I do not argue in terms of either pure science or pure belief, but in terms of refined common sense which legislators, acting in terms of sound legal and philosophic tradition of this country, have the right and duty to enact as law.

This article is scheduled for imminent publication in the Social Justice Review, but it has not yet been published. Regardless, I retain the copyright to it and do hereby authorize you and your committee to make any use of it you see fit, including placing it in the Congressional Record. If you wish to check the reputability of my work, confer with Under Secretary of State James L. Buckley who knows me and other of my publications. See also my article in the July-August Social Justice Review. Wishing you success in the conduct of your hearings, I remain,

Sincerely yours,

Dennis Bonnette

Dennis Bonnette, Ph.D.
(716) 745-3536

P.S. Enclosed article was originally part of a legal brief in a Suffolk County, New York medicaid abortion funding case. The attorneys urged its publication.

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POINT III-B

THE COUNTY LEGISLATURE COULD PROPERLY CONSIDER THE NATURAL LAW IN ITS APPROACH TO THE QUESTION OF WHEN HUMAN LIFE BEGINS

The Founding Fathers of the United States did not base the Constitution merely upon some form of social contract theory having only the force of positive law. Rather, they conceived society as a natural institution arising out of the exercise by free men of certain inalienable, God-given rights. They definitely based their conception of society upon a natural law theory, i.e., the conception that a Supreme Personal Being has created definite natures—structured realities, whose right to exist and to act flows from the Divine Imperative. For this reason the concept of a right does not exist in a legalistic vacuum; it is simply the prerogative of a being to exist and to act in the manner which accords with its nature or structure as given by God. And since existence (which is life for living things) is the very first act of any being, it constitutes the primal right of any being. Hence, the right to life is first in the structure of any system of rights; it is the basis for all the others - for nothing can exercise any secondary acts before it exists. For this reason, the right to life is absolutely prior to all other rights — including the rather lately discovered "right to privacy".

No person possesses a right to privacy unless he first possesses the right to life.

As is readily admitted by all competent life scientists, human life begins at conception. By life scientists is not meant merely medical scientists, but more primarily, the biochemists, biologists and embryologists whose disciplines are the actual foundation for medical judgment in this matter. For it is their analysis of the nature of fertilization which reveals that new, unique, independent and separate human organisms come into being at that moment.

The history of philosophy is not as completely subjectivistic, relativistic and pluralistic on this point as is frequently imagined. Philosophy is no mere Tower of Babel. If it were, no human institution or legal system could ever be established upon rational foundation. No judicial decision could ever be termed correct for all truth would be relative. In the face of such absurdity, it must be noted that Western Society, including ours, is an expression of a consistent development of a natural law philosophy. This is the origin of both English Common Law and Louisiana's Napoleonic Code. Recent attempts to deny the right to life of certain human beings as well as other novel developments in legal theory represent a marked departure from this natural law tradition of the Founding Fathers, but not a departure so novel as to be entirely new in Western thought. This departure from natural law ethics is represented by various forms of pragmatism and its offspring, situation ethics.

Ironically, the 'new morality' which permits abortion does so, not by denying that human life begins at conception, but rather, by affirming that the end justifies the means — that it is permissible to take a human life if circumstances warrant it. Such a mentality is, in the words of the Blackmun decision, "in keeping with the needs of the times." Yet it need hardly be elaborated that such a philosophy is simply no ethics at all. It is rather the rationale of the Holocaust - that certain classes of human beings, the unborn, are simply to be defined as "non-persons" - not to be accorded the traditional benefit of due process of law; to be eliminated if judged a social inconvenience.

In philosophical history, two main conceptions of man arise: the hylomorphic and the positivistic. The latter, which goes by many names, e.g., scientific materialistic, reductionistic, materialistic monistic, expresses a common conception that nothing exists but the material universe - not God nor the human soul nor any other spiritual thing. This view is often imagined to be new and, somehow, the only view really compatible with the finding of modern science. Actually, positivism is neither new (it dates back to Democritus in the Fifth Century B.C.) nor does it possess a sole claim to be natural scientific truth. This tradition of positivism expresses the simplistic theory, first put forth by Democritus, that "that nothing exists but atoms and the void." In the Nineteenth Century this view was revived by many scientific atheists who claimed that the newly discovered 92 elements of the periodic table were the sum and substance of all that exists. Twentieth Century Positivism reduces all things, including man, to the chemical elements (even subatomic) which compose them. In this view, taken literally, things (cabbages and kings) do not exist: only the atomic elements which "heap together to make them" exist. Thus, by this view, man himself does not actually exist; he is not a thing , but merely the accidental and temporary association of the real things of the universe, the atoms .

Such a view not only flies in the face of common sense, but also the actual judgment of reputable scientists regarding the beginning of human life mentioned above. For if neither courts, nor judges, nor human 'persons' actually exist as things according to positivism, then neither do any legal rights - to life or to privacy. The fact that the positivists of this century (in the form of logical positivists and linguistic analysts)have actually gone about "debunking" all notions of rights and morality is adequate evidence of the legal nihilism of their doctrine. Needless to say, most reputable scientists do not follow positivism to its logical conclusions, i.e., they do believe in their own existence. That is why they affirm that human life begins, before birth, at conception - and that man is not merely a "bunch of atoms", but a single, independently-living organism, a being in his own right capable of being the subject of natural and legal rights. No one would accord a right to life or right to privacy to a mere positron, a sodium atom or a quark. Nor do rights accrue to cabbages or monkeys. Only man, perceived as an entire substance, a being in his own right , is the proper subject of dignity, rights, and privileges. The philosophy of positivism, however dominant it may be in our day, is not a fit vehicle for the philosophy of law of our society. It is also not the philosophocial framework of the Founding Fathers.

The great philosophical tradition both of common sense and of Western Civilization is that of hylomorphism - a curious name for a common sense doctrine. Taken from the Greek, hyle - meaning matter , and morphé - meaning form , this doctrine means that all physical substances are composed of two reality principles which, though not things in themselves, taken together compose the things of our experience. However strange as this may sound at first, this way of describing things which dates back to Aristotle has the singular advantage of granting the reality of things above the level of the atomic. It corresponds to common sense in that it affirms the reality of cabbages and kings; we are not merely piles of atoms; we are substances possessing reality and unity of our own. This is the truth of common sense which positivism is unable to affirm.

Hylomorphism agrees with positivism in affirming that physical things are made out of matter — the principle of extension in time and space. The difference arises primarily over the notion of form — which is the principle which places a thing into its proper species, i.e., it is the real reason in a thing which constitutes it as what it is. It is what makes a horse a horse and a man a man. By insisting that it is merely the organization of matter (i.e., atoms) which makes a horse a horse, the positivist retains his materialism but at a price of the reality of the horse as a being in its own right. Hylomorphism simply recognizes the obvious fact that if beings are to exist above the level of the atomic, then there must be some principle which makes them one being, instead of a pile of atoms.

In affirming that things have natures (forms), natural law philosophy has dominated civilized thought from the time of Plato and Aristotle until the present. This doctrine alone accords with the common sense view that 'things' exist, such as trees and cows—not mere piles of atoms. Where hylomorphism rejoins the legitimate role of natural science is in saying that it is the organization of matter which determines what a thing is. For form is 'fitted to' matter; the disposition of the matter determines which type of form actuates it. Thus matter which is organized to be a cow receives, not surprisingly, the form of 'cowness.'

For this reason, the scientific evidence which leads to the conclusion that human life begins at conception in the scientific order also leads to the exact same conclusion in the philisophic order. The scientific evidence reveals that, at fertilization, the matter is disposed for the reception of no other form than the human form. The matter is not the matter of an elephant nor of a mouse. It is specific to man and only to man. Only the form of man can be fitted to it.

The fact that Thomas Aquinas became confused by the doctrine of successive animation (which held that successively vegetable, animal and then human forms were present) only reveals the inadequacy of biological knowledge of his day. Had he known that the matter of the human zygote was unique to man and to no lower species, his own metaphysical principles would have necessitated his declaring with the scientific community of our own day that human life begins at conception.

It should be remembered that the only alternative to the affirmation of substantial unities of things above the atomic level is to reduce all reality to the level of the atomic. Thus, contrary to the evidence of the natural law tradition of Western thought, common sense, and scientific evidence, positivism stands alone in attempting to deny the obvious, namely, that the larger substances of our world really exist. The philosophical conclusion that human life begins at conception is fully consistent with the great traditions of our culture, including the natural law doctrine upon which our entire legal system is based. It does not contradict the evidence of science, but merely expresses the truth which science affirms in a more sophisticated manner; Human life - which is such in virtue of the presence of a single human substantial form whose function is to animate and unify matter which is specifically organized for exclusively human life — begins at conception. The greatest of truths are frequently obvious.

human life[3] inherent in abortion without medical necessity

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[3] Throughout the abortion debate in America, and especially during litigation in the courts, unborn human life is variously referred to as actual or "potential". Seldom have the courts focused directly in their opinions on the implications of such a distinction. To assist the Court, we have included the following statement of Dennis Bonnette, Ph.D., Professor of Philosophy at Niagara University, which discussed the philosophical concept of potentiality, specifically in relation to human life in the womb.

"Because of the widespread misunderstanding of the notion of potency; two types of error arise regarding the nature of life in the womb. The first denies the actual existence of human life in the womb; the second assigns merely relative value to that life.

"The first error asserts that prenatal human life is simply potential, not actual. Precisely *what* is claimed to be potential is not at all clear. For if it is asserted that the 'product of conception' is only potentially *human*, such a claim flies in the face of all available scientific evidence as well as the evident fact of common sense that humans give birth only to humans, not to carrots or elephants or any other species of organism. For 'potency' is a term which refers to *what is not*. The negative connotation of 'potency' is made manifest when one realizes the uncomplementary character of remarking that someone is *potentially* quite intelligent. Hence, to refer to life which is merely *potentially human* means to refer to life which simply is *not* human. Thus, it becomes legitimate to inquire precisely what *other* species of living thing prenatal life may be -- for if it is *not* human, then it must be some other vegetable or animal form of life. Yet, as is clear

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Footnote 3, cont'd.

"from the most recent scientific evidence, e.g., the deoxyribunucleic acid in each cell of the zygote, embryo, or fetus, no other form of life *than* human is present in the womb. Such life is not merely potentially, but rather, *actually* human.

"On the other hand, if it is asserted that the 'product of conception' is only potentially *alive*, such a claim again flies in the face of all available scientific evidence as well as the evident fact of common sense that the intent of the abortional act is fulfilled only by *killing* that which is living and growing in the womb. Any doubt concerning the existence of an actual, living organism -- totally separate from the body of the mother -- being present from the time of conception has been dissolved before the very eyes of the entire world by the birth of the first 'test-tube baby' -- a baby conceived *in vitro*, i.e., in a laboratory dish. Since *non*-living tissue could never grow into a living baby simply by implanting it in a womb, it is evident that this 'product of conception' must already *be* alive. Hence, life must be *actually*, not merely potentially, present at conception.

"Since the 'product of conception' is neither merely potential as human nor as living at the time of conception, it necessarily follows that human life is *actually*, not merely potentially, present at conception.

"The second error involving the notion of potency would relegate life in the womb to a relative value by denying that its full potential is realized until some point in time after conception. The proponents of this second error argue that, since the unborn child fails to exhibit *all* the activities proper to man from the time of conception, he need not be considered a human person whose rights must be protected by law until he reaches sufficient maturity to exhibit such powers. This confusion fails to grasp the distinction between a power and its exercise. The logic of this argument would lead to the absurd conclusion that only a fully developed adult, simultaneously exercising all the powers of man, would be deserving of legal protection. The danger of this fallacious reasoning is underlined by the fact that even *born* children do not demonstrate clearly the use of reason until they approach their seventh year and that even teenagers might be declared 'not-persons' on the grounds that they do not yet manifest rational maturity. Is one human when he is not actually speaking or reasoning because he is asleep? Even the natural state of sleep

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Footnote 3, cont'd.

"reduces a normal person's most human activity to a temporary state of potency. Nor can any human being exhibit all the acts of man at the same time -- since many of these are contradictory, e.g., one can hardly drive a car while swimming. Thus the temptation to declare the unborn to be 'non-persons' simply because they do not presently exercise the full powers of their nature would also lead logically to the conclusion that other human beings who, because of age or state of health, are similarly unable to function fully may also be considered as "non-persons." This is the logic of genocide and euthanasia. Thus it is hardly surprising that a substantial number of deformed children are now being allowed to die through deliberate neglect at hospitals around the country, e.g., Johns Hopkins. Moreover, arguments are now advanced for the 'mercy-killing' of the elderly or 'hopelessly ill" patient whom others may judge to lack a 'meaningful human life.' The only rational alternative to the 'Holocaust' is the recognition that actual human life is present from the time of conception and that its rights must be protected by law.

"This second pernicious error arises because of a failure to distinguish between a human organism's primary act (which is 'to live') and his various secondary acts, such as growing, sensing, thinking, speaking, socializing, etc. While actual human life is present from the time of conception, nevertheless the powers or potencies for the various secondary acts are progressively actualized as this life matures. Such acts are distinct from the living existence upon which they depend -- for secondary acts may be intermittent while human life is continuous. Thus we may cease to walk or talk or think and yet still be living, e.g., when asleep or comatose. Secondary acts come and go; life remains. The progressive development of organ systems in the unborn child represents such an unfolding of secondary acts in an organism whose actual life has been present from conception and upon whose primary and continuous act of living all secondary life activity depends.

"It is the above-mentioned failure to grasp this simple distinction between the basic and continuous presence of human life and the progressive, developing, intermittent, and declining secondary acts of our various powers which has not only permitted our society to deny the rights of the unborn but thereby to place in jeopardy every human life whose 'qualities of manifestation' may fail to meet the measure of those who decide who shall live and who shall die."

April 21, 1981

Testimony presented to the Senate Judiciary Subcommittee
of Separation of Powers
Chairman, John P. East

HUMAN LIFE BEGINS AT FERTILIZATION

Herbert Ratner, M.D.

In a very telling characterization of modern man, the late Bernard Berelson "a distinguished sociologist and vice president of the Population Council" and his associate Gary A. Steiner state:

> Perhaps the character of behavioral science man can best be grasped through his orientation to reality. He is a creature who adapts reality to his own ends, who transforms reality into a congenial form, who makes his own reality.... In his quest for satisfaction, man is not just a seeker of truth, but of deceptions, of himself as well as others." (Human Behavior: An Inventory of Scientific Findings. Harcourt, Brace & World, 1964, pp. 663-4)

There is no better illustration of the above than the gynecologists' and social engineers' recent redefinition of the beginning of life to accommodate the use of abortifacients for population control. In changing the definition from fertilization to implantation they manifest a tendency noted by Berelson and Steiner in modern man when confronted by a reality which he prefers not to accept:

> When man can come to grips with his needs by actually changing the environment, he does so. But when he cannot achieve such 'realistic' satisfaction, he tends to take the other path: to modify what he sees to be the case, what he thinks he wants, what he thinks others want. (p. 664)

In contrast to the claim that life begins at implantation, we have the conclusion of the world's most authoritative embryologist, who has studied this question for over thirty years, Erich Blechschmidt:

> ...the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum. For this reason we have to regard the intrinsic quality of the fertilized ovum as an essential prerequisite, decisive for all future ontogenesis." (The Beginnings Of Human Life. Springer-Verlag, New York, Heidelberg and Berlin, 1977, p. 17)

The universality of this teaching, that human life starts with fertilization, can be documented in virtually all educational materials at any level of the curriculum. Thus, the most widely used of contemporary high school textbooks on sex education, states: "Human life begins when the head of the sperm cell, which carries the nucleus, unites with the nucleus of the ovum or egg cell." The late Alan Guttmacher, then President of Planned Parenthood-World Population and a foremost crusader for "abortion on demand," is credited as a consultant. (Modern Sex Education. Julian, C. J. and Jackson, E. W., Holt, Rinehart and Winston, Inc., New York) In the best seller From Conception To Birth: The Drama Of Life's Beginnings (Robert Rugh and Landrum B. Shettles, Harper and Row, 1977) the authors define the beginning of life as the "fertilization of the ovum by the spermatozoon, thus initiating the development of an embryo and starting pregnancy." (Glossary, p. 237) Earlier and shortly after the Supreme Court decision of January 22, 1973, Professor Landrum Shettles, a test-tube experimentalist, in a letter to the New York Times of February 14, 1973, commenting on the Court's indecision as to when life begins, stated: "...a new and composite individual is started at the moment of fertilization" and concludes: "To deny a truth should not be made a basis for legalizing abortion." Clearly, the producers of test-tube babies refuse to be denied their success in originating life at fertilization.

George Orwell of 1984 fame, in an essay entitled "Politics And The English Language (The Orwell Reader. New York, 1956, pp. 355-6) warned us that "...if thought corrupts language, language can also corrupt thought." It is not too harsh to transfer to contemporary medical language his blunt conclusion about political language: that it "is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind."

This is a day and age when violence surrounds us and is mounting, and we are faced with a widespread loss of respect for life in our society. Can we honestly make ourselves believe that we can redefine life to suit our convenience? Such manipulation of language may be welcomed as an opiate by the self-styled intellectual; it will not deceive the common sense of the average citizen.

The average citizen soon learns that many alleged contraceptives are really abortifacients, that they do not prevent a human life from beginning but destroy human life after it has begun. He sees that the self-announced experts and leaders of public opinion are urging the principle that when others are an inconvenience to one's life it is acceptable to kill them off. What an awful principle for the medical profession and representatives of the people in government to promote!

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April 22,1981

Senator John P. East
Senator of N.C.
Russell's Building
Senate of the U.S.A.
Washington, D.C.

Dear Senator East,

I'm writing you in connection with your Bill S158, which was recently sponsored by you.

The Bill's statement that "the Congress finds that the present day scientific evidence etc., "is inaccurate, misleading and in contradiction with basic principles of biological teaching on the development of the animal kingdom, specifically its highest class: Mammals.

Your Bill actually reflects the situation in Biology one or two centuries ago when the teaching was of the existence of a homunculus in utero(a small human being in the womb) from the "moment of conception", needing nine months to grow up, and be delivered as a new born child. However, the last century and a half of scientific progress dispelled that misconception and with the help of embryology and histology gave us the time picture of development of a fertilized egg by all mammals, specifically the order of Primates including Homo sapiens, the crown of the class of Mammals.

German physician and biologist professor Dr. Ernst Heinrich Haeckel (1834-1919) discovered and formulated a Law which is as valid and true now as it was at the beginning of this century and will be true in the future of Biology and Medicine: namely, that in the development of all Mammals each ontogeny must go through its phylogeny. To put it simply, this means that the development of a single organism must go through the evolutionary pattern of the development of its phylum i.e. its "basic division of animal kingdom". In other words, in the case of Homo sapiens, during 40 weeks of development of a fertilized human egg ("from the moment of conception") that zygote has to divide, increase in number of cells and go through stages of morula, blastula, gastrula, 2 germinal layers of oocyst, then 3 germinal layers, etc.,etc., looking in these early stages very much like any developing zygote of any Primate ("Primate:any member of the most highly developed order of animals, composed of man, the apes, monkeys, lemurs, etc." Webster). Naturally, later on it assumes more and more human features: urogenital sinus ("bay") divides into urinary, genital and end-intestinal canals with two holes by male and three by female, developing during the third month definite differentiation of sexes, etc., etc.

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Now since the above is the actual scientific evidence and the Haeckel's Law of development: where is your "actual human life from conception"?!

Gentlemen, if you pass this Law of yours, you are going to be the object of jokes and ridicule not only at home but all around the world: from the Japanese Diet, across Russian Supreme Soviet, Polish Sejm, German Bundestag, British House of Lords and Commons back to Washington, D.C. and the Congress of U.S.A.

I for one can't and won't accept a female egg hit by a male sperm and turned into a zygote("human life from the moment of conception") as equal with 230 million living compatriots.

Let him (or her) fully develop, be born alive and in that way become one of us("American by birth or naturalization",as the Constitution clearly states). In other words, let that new born person become a new American citizen and only then assume all Constitutional rights and duties invested in American citizenship and protected by the Constitution of the U.S.A.

As an American physician I'll take care of the pregnant woman in the future too, giving her all help and service according to her decision to carry or to terminate her pregnancy. However, if you pass this Bill, I'll get stuck with the possibility of termination of the pregnancy and I'll throw the whole blame and the whole book to your doorsteps at the Congress of the U.S.A.

Thank you very much for your attention.

Sincerly yours,

Milan M. Vuitch,M.D., F.A.S.H., F.I.B.A.
Medical Director

MMV/cm

COLLEGE OF ST. THOMAS
St. Paul, Minnesota 55105

DEPARTMENT OF PHILOSOPHY

May 23, 1981

The Human Life Statute and Abortifacients

One of the recurring objections to the proposed Human Life Statute is that it will make the use of abortifacients illegal--perhaps a felony of homicide. This objection involves a simple non-sequitur. Even if the statute renders abortion illegal, it has no direct bearing on the use of abortifacients. One using an abortifacient does not know whether or not someone will in fact be killed and no one else could in principle know. There is no identifiable person whose right to life is violated. There is no corpse but only the possibility of one, and this possibility cannot be verified--hardly a situation in which someone could be prosecuted for homicide. The relevant evidence is in principle missing. If a human life statute were passed, there might be some grounds for arguing that there ought to be laws prohibiting abortifacients as devices harmful to unborn persons, but this would have to be legislated separately. The objection, therefore, does not depend on any logical consequence of the statute but on what might (but in all likelihood would not be) a subject of further legislation in the future.

Joseph M. Boyle Jr., Ph.D.
Associate Professor

May 16, 1981.

Senator John East
U.S. Senate
Washington, D.C. 20510

Dear Senator East:

I write with a feeling of gratitude to you for holding the extremely important Senate hearings on the Human Life Statute and the biological or scientific definitions of human life and its "beginnings".

In my judgement the hearings have been an enormous success thus far, and received the media coverage that this vital issue rightly deserves.

I am enclosing a paper approaching the issue of abortion from a philosophical perspective, or perhaps it could be more accurately described as a logical perspective. The paper is derived from a lengthier paper which I presented to Dr. Brooks Colburn* at Manhattanville College. It caused him to re-think his pro-abortion position.

It is my hope that this paper will further clarify and strengthen the pro-life position, and show that the pro-abortion position is really a subjective preference which does not take into account the objective reality of the total picture for all individuals concerned and for society.

With kind regards, I look forward to hearing from you.

Barbara Braun
149 Moehring Drive
Blauvelt, N.Y. 10913

Tel: 914 359 2591

Barbara Braun

(Mother of 5, grandmother of 5, homemaker, part time teacher of social studies and psychology at Rockland Community College)

* PH.D in Philosophy

Abortion is the ending of a pregnancy before the embryo or fetus can live outside the female body. Abortion results in death of a fetus and may be either spontaneous or induced. This paper will restrict itself to a discussion of induced abortions on human females in the United States, and show that our current policy has caused a contemporary social problem; that is, a conflict in violation of ethical standards occurring within a large segment of the population (whether or not they are aware of it).

This paper also establishes the fact that abortions are morally wrong.

The historical background is familiar to all on the committee, but it is essential to draw attention to the fact that the unrestricted liberty to abort one's own child now takes preference over the rights of three groups:

1) the unborn children, part of our future
2) fathers, who lose their legal right to procreate
3) parents who lose their natural right to guide their minor daughters (even though they must bear the financial burden and assume responsibility once again, if there are medical complications as a result of an abortion)

The issue of whether of not a mother has a right to abort a living reality that is growing within her merits most conscientious clarification, for if the claims of those who favor abortion are false, unimaginable and irreparable harm is being done to millions of innocent lives and to society as a whole.[3] In fact, many, many more unborn babies have been killed than all of the combat deaths of United States citizens in all of the wars that the country has engaged in.

If one were a religious person, one could argue in behalf of a reasonable belief that all human life has an intrinsic value, that each person is unique and irreplaceable, and possesses dignity and sacredness and eternal value from the first moment of fertilization until natural death. However, since this argument has an element of faith in it, this paper clarifies the moral issue of abortion without resorting to religious values.

THe term "unborn child' or "human reality" will be used to include the product of conception resulting from the fertilization of human egg and sperm (zygote) through the fetal and embryonino states, until birth. The biological facts affirm that the human reality is a separate life, totally dependent upon, but distinct from the mother's body since every cell is endowed with a unique genetic make up which differs from every cell of the mother. As a New York State biology textbook describes it,"... a human life begins when a single sperm unites witha single egg" and up to four days are required for the egg to implant itself in the uterus.[4] Whether this reality is "fully" human in the sense of having attained maximum physical or material potential is an irrelevant question because full humanity, if there is such a thing, is not attained for a long time after birth, and certainly not reached by all adults. To paraphrase Aristotle:

> Every being, therefore, that is capable of changing is something and at the same time has the capacity for being something else. What a thing is, ARistotle calls actuality;

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3. Planned Parenthood, (N.Y.: Pub. by Planned Parenthood Federation, Inc.) 1972, p. 18.

4. Alvin Nason and Philip Goldstein Bio logy; Introduction to Life (Menlo Park: Addison-Huxley, 1969) p. 532-533.

> its capacity to become something else, he calls potentiality. Actual being is that which is, potential being is that which can be. 5

The unborn child is, and can become, and therefore, in this respect, there is no distinction between unborn children, children during their formative years, and adults.

Human life is, therefore, matter which has being or existence (actuality), and has essence (potentiality) characterized by ability to absorb food, growth, differentiation and interdependence of function, reproduction, response to pain, reasoning ability which implies choice, imagination, ability to use language or symbols, and a sense of morality. All of these qualities are integrated through one unifying principle or agent which is identical with the qualities acting. Not all human beings would attain maximum perfectability of each quality or function, but this would not diminish in any respect the immaterial, unifying agent sustaining what otherwise would be aimless or random atoms, and this principle we call life.

Jean Moroux, in The Meaning of Man, describes a human being as " the most paradoxical of all realities; a being who is simultaneously spirit and body, closed and open, existent and yet to be acheived...". He says:

> Spatiality confines him to one small corner of the universe; temporality makes him emerge and fall back at defined points of cosmic movement; opacity makes him resistant, impenetrable, divided off from others; plurality denies him inner unity and makes him a precarious and unstable assemblage of forces only momentarily composed; and finally the synergy of relations compels us to call him a meeting place for passing forces, a medium of co-existence, a knot of contacts and reactions. But the human person is also a spirit... There is nothing spatial about him or temporal; he is not shut up in a place or held within the limits of a moment; he comphrehends space and surpasses time... He is made, moreover, for understanding, and in the very act of understanding he is disengaged from sensible conditions and escapes from time... He is simple, not to be defined by any plurality or co-existence of parts, but rather by an absence of parts and plurality;

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5. Brother Benignus, FSC, PhD. Nature, Knowledge and God (New York: Bruce, 1947) p. 68.

> as a pure presence to self, linked up, beyond number and enumeration, with other immaterial presences; and as a totality able to unify and concentrate within himself the whole infinite materiality of the universe.. (Italics mine).[6]

Moroux further describes how a human being is " absolutely distinct and necessarily incommunicable"and therefore an "inviolable mystery". But he is also open, part of a wider unity which gives him meaning in his relation to others and also to the species as a whole. Therefore he is both an "excentric point and a centre".

From all of the above, deductively we might reason that:

Premise 1 - All unborn children possess life.
Premise 2 - All life has unrealized potential.
Conclusion - All unborn children have unrealized potential.

Therefore, to destroy the unborn human reality is to destroy all of its potential for fuller life. It is tantamount to destroying the human essence as well as its existence. Another term for this, up until January 33, 1973, was "murder" which has been defined as "the unlawful and malicious or premeditated killing of one human being by another".[7] Since abortion was legalized the unlawful and premeditated killing is lawful: so it appears we must change our concept of murder or else declare that the living reality within a mother's womb is non-human, meither of which is true.

The absolute irrevocability of the act of abortion is another factor we should take into account. For, speaking from the point of view of the unborn reality, when we weigh the premises that all death is final and all of the future uncertain, the inference seems justifiable that an uncertain future is more desirable than certain death. Expressed in another way, the future holds the possiblity of being more desirable than does certain extinction. Where there is any doubt and the doubt may eventuate favorably for the future and for.life, common sense would tell us to decide in favor of the doubt rather than the

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6. Jean Moroux, The Meaning of Man, trans. by H.G. Downes, (Garden City; Doubleday Image Books, 1948) p. 113-114.

7. Webster,s New World Dictionary, College Ed., s.v. "murder". (Webster's New Student Dictionary 1974 ed. essentially gives the same definition omitting the word " malicious" and giving a second meaning of "mangle").

certainty of no future at all.

looking at the problem from another viewpoint, it is true to say that all human beings are derivative, resulting from the fertilization of human sperm and egg. Even in in vitro fertilization or in cloning, the nucleus of the individual to be replicated comes from the derivation of two human beings.[8] Therefore, to destroy the result of this fertilization is to destroy the only way that we know for human life to come into existence. One could reason as follows:

Premise 1 - Human lives are all and only those realities which comes from the fertilization of human sperm and egg.
Premise 2 - An unborn baby comes from the fertilization of human sperm and egg.
Conclusion - An unborn baby is a huma life.

For those who may still doubt, we could make a disjunctive proposition. The unborn reality either is a human life or it is not a human life. Both cannot be true. If it is not a human life, what is it? We know it is not a mole or polyp or tumor or wart or animal or fish or fowl or acorn or anything non- human that we can think of. Therefore, if the second part of the proposition is false the first part must be true; it is a human life.

The question arises, what if the destruction of unborn huma life were carried to an extreme? Would not all of humanity be destroyed after the death of the existing generation? Therefore, fallible, man-made criteria (as oppposed to natural) would have to be established to decide who should live and who should die if the human race were to avoid complete annihilation. Once this has been admitted, the danger seems obvious. For who should make the decision? And upon what universal standard that would be more important than the preservation of life? Or should the standards be relative? If relative, relative to what?

To advance a step further in our reasoning, the conception of life is a voluntary act (voluntary on the part of at least one party), and the act of abortion is a voluntary act, and therefore, these acts come under the scope of ethics, which attempts to ascertain the rightness or wrongness of voluntary acts of the will over which man has choice.[9] The unborn reality which is brought into being by the voluntary act is both innocent of any wrongdoing, and defenseless. Despite any feeling that the mother might have that her act of abortion was good and right, the ethicist would try to demonstrate that what might appear good for the individual here and now, could be seen in the long run to be bad for humanity, or even for the same individual. Most important, the total human situation would take into account what would be good for the unborn child.

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[8] "We Have the Awful Knowledge to Make Exact Copies of Human Beings", N.Y. Times, Mar. 5, .972, Magazine Section

Thus far, we have tried to clarify our thinking about individual abortions and their consequences. However, we must also try to show that life is good. We can do this inductively by applying the "open question test" of "do you want to life?". The majority of people would answer "yes", for if not, they would voluntarily choose to take their own lives. This is factually supported by own suicide rate. It is almost impossible to determine that any particular "X" causes suicide (e.g. that life is not good), because the range of possible variable is enormous and "especially since suicide is such a rare event which make subjects scarce". However, it is pertinent that the completed rate of suicide of pregnant women is only about one-sixth of the estimated rate for women in general, and even the attempted suicide rate is still more rare during the third semester of pregnancy.[10] Durkheim, a sociologist, states that "since the respect for human personality in our society is so great, we hold a fundamental value the abhorence of suicide".[11] This reinforces the idea of the basic worth of life. More directly, the mother herself feels that her own life has value, though she chooses otherwise for her unborn child who is permitted no choice in the matter.

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9. Whether on not the choice is completely free, I have treated in another paper, but it would not affect the principle upon which the free choice would be based. Indeed it would, however, permit great compassion for the person having an abortion while at the same time disagreeing with her in principle.

10. Daid Lester, Why People Kill Themselves, (Springfield: Charles C. Thomas, 1972) pp. 10, 43.

11. Emile Durkheim, Suicide, trnas. by A. Spaulding and George Simpson, introd. by George Simpson (New York: Free Press, 1951) p. 31.

An intuitive appreciation of life is apparent in the writing of many such artists as Walt Whitman who in Leaves of Grass sings out "I celebrate Myself"; or Alexander Solzenitzen and Victor Frankl who give living tribute to the tremendous power and strength and preciousness of life in their anguished cries for life after having endured suffering and degradation and imprisonment.

From an overall perspective, our society has dedicated itself to the principle of preserving life, and expresses this in an intuitive manner in the Declaration of Independence.

> We hold these truths to be self evident,that all men are
> created equal, that they are endowed by their Creator with
> certain inalienable rights, that among these are life... that
> to secure these rights, governments are institutied among men.

The word "life" is followed by the words "liberty" and "the pursuit of happiness". The latter two would be quite meaningless without the prior right of life. Also, the guarantee is for the pursuit of happineee, not happiness itself. The Fourteenth Amendment of the Constitution reads:

> Nor shall any state deprive any person of life, liberty, or
> property without due process of law, nor deny to any personwi
> within its jurisdiction that equal protection of the laws.

The Declaration of the Rights of the Child given by the United Nations Assembly on November 20th, 1959 states:

> The child be reason of his physical and mental immaturity needs
> special safeguards and care, encluding appropriate legal prtoection
> before as well as after birth.

In addition, Planned Parenthood in its 1963 Manual answered the question concerning birth control, " Is it abortion?", with the words, "Definitely not. An abortion kills the life of the baby after it has begun. It is dangerous to your life and halth. It may make you sterile..." .

Commonly observed occurrences in daily life also demonstrate that our society evidences a respect for human life, as when we go to great lengths to save the life of a premature baby, diligently attempt to save minors trapped underground, or attempt costly and life threatening methods to save submariners trapped under the sea. We transplant organs from the victims of sudden death to another human being to help prolong his or her life. The medical profession (until the advent of legalized abortion) dedicated itself to the preservation of life as enumciated by the Hippocratic Oath, still taken at some medical schools today, which oath specifically forbids abortion.

From these examples, it is evid[illegible]our society is living in a state of contradiction. The principle of contradiction states that "it is impossible for the same thing to be and not to be at the same time".[12] We cannot be for life and against it at the same time. This is a contradiction of principles. If we accept the premise that all life is potentially good and then we destroy innocent life, we destroy that which is potentially good. Therefore, the act of destruction is evil.

That a society cannot survive schizophrenically split between two opposing ideals, is aptly stated by one of Britain's most distinguished jurists, Lord Patrick Devlin.

> If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bond of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of society' and mankind, which needs society, must pay its price...[13].

The effects on society as a whole are also apparent from the lessons that history teaches us. Arguing by analogy, we can compare the status of the unborn with that of the Negro of the past. For, in each case, human life and legal person were separated. In 1857 the Dred Scott decision declared that no Negro, free or slave, could claim United States citizenship. Further, Congress could no prohibit slavery. History records that slaves were treated as things, not persons; bought and sold as property; that while no one was forced to become a slave owner, one had no right to impose his morality (that a slave was a person) on someone else; and finally that a man had a right to do what he wanted with his property (the slave).[14]

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[12] Celestine N. Brittle, The Science of Correct Thinking, (New York: Bruce, 1935) p. 125.

[13] Harry K. Girvatz, Contemporary Moral Issues, 3rd ed. (Belmont; Wadswroth Pub. Co., 1974) Homosexuality by Patrick Devlin, p. 173.

[14] World Book Encyclopedia, 1974 ed., s.v. "Dred Scott".

A similar analogy could be drawn between the concept of a "Master Race" or "quality life". Who can define "quality life"? And who would set the standards? Is it not within the realm of possibility that it could again be someone like Hitler, whose killings were called atrocities? Santayana states that "Those who do not remember the past are condemned to relive it".[15] The monument at Dachau in like manner asserts:

> This nomument represents for us a testimony and a warning... A warning to the living, of today and all time to come. A warning that evil is always in man and that he must fight against it at all times. Consider that the epoch which underwent such massacres is not far from us, neither in time nor space. Help us to testify of the past. Help us to protect the future.

From the point of view of alienation, one of the great problems of today's society, Kenneth Kenniston envisions an alternative by which society can survive and that is to have as its goal full human development.

> But though no single definition of human fulfillment is possible, Some of its results can be defined. A whole man or woman has a capacity for zest, exuberance, and compassion, though this capacity may often be in abeyance. An integrated man does not cease to experience tension, anxiety, and psychic pain, but is rarely overwhelmed by it...Above all human wholeness means a capacity for commitment, dedication, passionate concern, and care... responsiveness to his ethical sense ... 15

Mr Keniston ends his essay with the following admonition.

> We can hope for such commitments in the future only if men begin to resolve their alienation by commiting themselves - through the analysis, synthesis and reform of their own lives and worlds - to the preparation of such a new society ... that enjoys diversity and supports human fulfillment. 16

Surely the alienation of a mother from her unborn child and the abdication of the father, whose life has been transmitted to this child, is one of the deepest forms of alienation our society has ever seen, and makes any attempt at human fulfillment a total impossiblity for some members of society (the unborn).

Therefore, the issue of abortion does not revolve around the enforcing of

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15. Girvatz, Contemporary Moral Issues, Escape from Alienation by Kenneth Kenniston, pp. 39w-406.

16. Ibid. p. 410.

a single"law" or value imposed on people from without. Abortions, on the contrary, involve the relation of one human being to another in a social context. A variety of values converge - life, potential, responsibility, psychic pain, social effects, and perhaps the most important and least mentioned of all - love.

Scales are a traditional symbol of justice, but they suggest a quantitative aspect of weighing which is contrary to the original intent of the founders of the symbolism. Then in Egypt, " a feather, the Egyptian heiroglyphic for truth (emphasis mine) turned the bablnce", and the slightest turning of the scales was believed to decide between salvation and annihilation. "Not the matching of weights, but a response to reality" (emphasis mine) was what justice was seen to require. [17]

Today the totality of the abortion issues requires a balanced moral judgement that takes into account limits, interrelations, and priority of values. The absoluteness of a law prohibiting abortion is limited, for in the case of ectopic pregnancies or cancer of the uterus, abortion has been and should continue to be permitted, and the mother's life given preference. However, abortion should be deplored as immoral if it is a judgement or action that gives greater preference to interests less than human life, than to human life itself. It should be deplored if it is a judgement or action in which a mother abdicates her responsibility to the life she carries within her. It shoul be deplored if it makes killing a permissable part of the medical profession. It should be deplored if it makes tax supported agencies of the state procure and fund the destruction of life. It should be deplored it it takes human rights away from the father of the child, or the parents of a minor daughter. To accept abortion under these circumstances is to subordinate the higher value of life to the personal autonomy or sovereignty of the mother and her so called "right to privacy". It is the premeditated and willful subordination of the higher to the lower value that proves abortion to be morally wrong. Abortion is also tragic because it shows the destrction of one of humanity's fundamental existential virtues, and that is hope.

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17. John T. Noonan, Jr. How to Argue About Abortion, (New York: The Ad Hqc Committee in Defense of Life, 1974) p. 12.

A simple poem by Emily Dickinson captures much of what this paper has attempted to say.

All but death can be adjusted;
Dynaties repaired,
Systems settled in their sockets,
Citadels restored -

Wastes of lives resowm with colors
By supremer springs,
Death - unto itself exception -
Is exempt from change.

Barbara Braun

(excerpted from a paper written by the above, which includes a second section that answers each argument put forth by the advocates of permissive abortion.)

Barbara Braun

PART 2.--SUBMISSIONS PRESENTED BY SARAH WEDDINGTON

STATEMENTS FROM ORGANIZATIONS SUBMITTED BY
SARAH WEDDINGTON
TO
SENATE JUDICIARY SUBCOMMITTEE ON
SEPARATION OF POWERS
JUNE 18, 1981

THE ALAN GUTTMACHER INSTITUTE

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

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AMERICAN HOME ECONOMICS ASSOCIATION

AMERICAN PSYCHOLOGICAL ASSOCIATION - DIVISION OF PSYCHOLOGY OF WOMEN

AMERICAN PUBLIC HEALTH ASSOCIATION

AMERICANS FOR DEMOCRATIC ACTION

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

B'NAI B'RITH WOMEN

CATHOLICS FOR A FREE CHOICE

CENTER FOR POPULATION OPTIONS

COALITION OF LABOR UNION WOMEN

COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS OF COALITION FOR MEDICAL RIGHTS OF WOMEN

EPISCOPAL URBAN CAUCUS

FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN

MS. FOUNDATION

NATIONAL ABORTION FEDERATION

NATIONAL ABORTION RIGHTS ACTION LEAGUE

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NATIONAL CONFERENCE OF PUERTO RICAN WOMEN, INC.

NATIONAL EDUCATION ASSOCIATION

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION

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NATIONAL WOMEN'S HEALTH NETWORK

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RELIGIOUS COALITION FOR ABORTION RIGHTS
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- AMERICAN ETHICAL UNION
- AMERICAN ETHICAL UNION, NATIONAL WOMEN'S CONFERENCE
- AMERICAN HUMANIST ASSOCIATION
- AMERICAN JEWISH CONGRESS
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ZERO POPULATION GROWTH

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Statement Submitted to the Senate Judiciary Subcommittee on the Separation of Powers On Behalf of the Alan Guttmacher Institute

This statement is being submitted on behalf of the Alan Guttmacher Institute. Based on over a decade of research and analysis of reproductive health issues, the Institute is forced to conclude that a measure such as S. 158, the Human Life Statue, would have serious, and often irreversible, adverse effects on the lives and health of millions of Americans who would be denied access to safe and legal abortions.

S. 158 purports to be a simple congressional determination of "when life begins." In reality, however, it is much more. S. 158 seeks to overturn the decision in 1973 of the Supreme Court that a woman, in consultation with her physician, has a constitutional right to have an abortion, if she chooses to do so in the light of her own conscientious and religious beliefs and in the context of her individual life circumstances. If passed, S. 158 would, for the first time in history, consider a fetus, or even one cell with human genetic potential, as a person with full constitutional rights.

S. 158 is intended to make abortion illegal by setting the rights of the zygote, embryo or fetus as equal to and in competition with the rights of the woman, who in time might give it birth. Yet, even the measure's staunchest proponents cannot agree on the extent to which the bill would accomplish its ultimate goal. Some argue that S. 158 would give individual states a legal basis to outlaw abortion. Others believe that states choosing not to outlaw abortion could find their laws challenged on behalf of unborn, yet constitutionally-protected fetuses. Still others assume that S. 158 would prohibit any state law or policy that subsidizes or aids abortion, such as voluntary Medicaid funding of abortion or the performance of abortions in public hospitals. The legal status of some of the most effective methods of contraception, the pill and the IUD, would be placed in jeopardy.

At a bare minimum, S. 158 would immediately deprive thousands of American women of the right voluntarily, safely and legally to terminate unintended pregnancies. Deprived of this ability, thousands of desperate women would resort to illegal or self-induced abortions, as they did prior to the 1973 Supreme Court decisions. Many, like 109 women who obtained illegal abortions in 1970 alone, would die. Some, as a result of "botched" procedures, would never be able to bear children. Many others would suffer often irreversible damage to their health and well-being and mortgage their future and that of their loved ones. If prenatal genetic screening could not be followed by abortion, if a grave fetal abnormality were found, many thousands of American families each year would not dare risk pregnancy.

Since 1973, safe and legal abortions have been obtained most widely by those very people for whom unintended childbirth poses the gravest danger: young, old, unmarried and minority women. Teenage pregnancies and births are more likely to be problematic medically and teenage parents are more likely to need welfare or other public benefits. Deprived of access to legal abortion, many thousands of these women would be unable to obtain any abortion and would be forced to carry their unintended pregnancies to term. Added to the devastating personal price that would be paid by these women and their entire families, would be the staggering financial burden that would be paid by society for caring for these women and their children.

A measure such as S. 158 would hamper the ability of millions of American women to bear healthy children. It would cause serious injury to many and death to some. It would prevent thousands at risk of bearing children with severe genetic defects from bearing any children at all. It is a measure that should not be adopted.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN 2401 VIRGINIA AVE., N.W. / WASHINGTON, D.C. 20037
Phone 202/785-7700

The American Association of University Women (AAUW), the largest and oldest national organization working for the advancement of women, strongly opposes S.158. Founded in Boston in 1881, AAUW now has 190,000 members located in every state, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

The AAUW opposes all attempts in the 97th Congress to undermine the Supreme Court decision legalizing abortion, whether it be by a statutory change in the United States Code, such as S.158, or a Constitutional amendment. The AAUW supports reproductive choice on the grounds that it is a woman's right, regardless of her economic position, to control her own body and reproductive life.

The Association's stand on the issue of choice reaffirms the AAUW's strong commitment to the rights of an individual and the right of privacy. As early as 1935 the AAUW Legislative Program included a statement advocating that physicians be allowed to dispense information on contraception.

In 1970 the Hawaii division launched a drive to repeal that state's restrictive abortion laws. This move spearheaded an AAUW movement in other states to work on the issue of restrictive legislation on abortion. The basis for this direction in legislative action was twofold: first, it recognized the right of a woman to control her own body; second, it expressed the feeling that no woman should have to bear an unwanted child.

In June 1971 the AAUW Convention adopted the following resolution:

> "AAUW encourages members and divisions to work for the repeal of restrictive laws on abortion, making abortion legal for those who wish it after medical consultation."

It was also in 1971 that the AAUW signed on to an amicus curiae (friend of the court) brief in the Supreme Court case of Roe v. Wade that ultimately led to the 1973 decision legalizing abortion. The Association's 1979-81 Legislative program has designated, as a priority, support of a woman's right to freedom of choice in the determination of her reproductive life.

STATEMENT OF GEORGE M. RYAN

Mr. Chairman, and members of the Subcommittee, I am George M. Ryan, Jr., Professor of Obstetrics and Gynecology and Community Medicine at the University of Tennessee Center for the Health Sciences in Memphis, Tennessee. I am also currently the President of the American College of Obstetricians and Gynecologists, a medical specialty society, the membership of which includes more than 23,000 physicians who specialize in the provision of health care to women in America.

I appear before you today as an individual physician but prepared to share with you the official policies and current position of the ACOG with regard to the legislation before this Subcommittee. In either role -- as a physician with nearly thirty years' experience in obstetrics and gynecology and related fields of concern, or as the President and spokesperson for the largest professional association concerned strictly with women's health -- I solicit your consideration of the few points that I feel must be made here today and I invite your questions and comments.

The legislation now before the Subcommittee has been introduced in the Congress in various forms -- as a proposed Amendment to the United States Constitution; as a proposed revision or addition to the United States Code; and in both forms it has been proposed with and without exceptions, explanations, and other variables. The common element in all of this legislation, however, is the goal of making the provision of abortions illegal in this country. The bill under consideration (S 158) would permit states to end legal abortion services by means of defining human life to include that period of time during which the fetus may develop following conception. I do not wish to engage in a debate of the relative "rightness" or "wrongness" of abortion. My position and that of the American College of Obstetricians and Gynecologists is in support of the Supreme Court decision in Roe v. Wade. My purpose in being here is to provide expert testimony which I, as well as many of my colleagues, feel is absolutely necessary to assure that Congress has information on the broad health ramifications of this bill rather than viewing it only as a measure that simply addresses the abortion issue.

The proposed legislation reads in part:

> ". . . human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein."

You have heard in earlier testimony before this Subcommittee, in testimony presented by reputable and qualified physicians and scientists, that "life begins at conception." I am not here to discuss this issue which many feel is not a question subject to a purely scientific answer. At conception there is cellular life, in biological terms. However the proposed legislation attempts to integrate the presence of such cellular life with a legal definition of "personhood" with all the attendant rights of citizenry which are protected by the Fourteenth Amendment to the Constitution. The concern which you must hear, from me and from my colleagues of the American College of Obstetricians and Gynecologists, is that when Congress equates cellular life to personhood it is taking a substantial leap beyond the current views of the medical and scientific community that will have a major and lasting effect upon the health care of women in this country, the practice of medicine in this country, and the personal health practices of a large portion of our population.

The legislation before you defines personhood as beginning at the moment of conception. The product of this conception, by definition of the legislation, would be entitled to Fourteenth Amendment protection as a person regardless of "health, defect, or condition of dependency." It is essential that you, as the duly elected representatives of your states and the citizens of this country, must be fully aware of the impact which can be realistically expected to result from Congressional passage of this proposed legislation. You must know that granting the conceptus the Constitutional protections of personhood disregarding the relative and critical factors of health, defect, and condition of dependency, will have an immediate and enduring effect on women's health care.

To declare rights for the conceptus equal to those of the woman will create competition for medical care since the health interest of the fetus is not always consistent with the health interests of the pregnant woman. In fact, the physician potentially could be required to make medical decisions not in the best interest of either woman or fetus and possibly to the detriment of both.

The majority of pregnancies in this country occur in circumstances where the woman is understandably concerned with maintaining her own health and producing the healthiest child possible. We, as physicians, offer care and advice to enhance the health and quality of life of the woman, both as an individual and as the bearer of children. In this role, the physician is committed to the best interests of the woman, who entrusts herself to the physician's care. This proposed legislation would create unsolvable problems for us in meeting this commitment.

Some of the major advances in obstetrics over the past twenty years relate to our ability to evaluate the intrauterine status of the fetus and perform early delivery of the fetus when indicated. Many of these premature births relate to maternal disease. Toxemia is a disease of pregnant women characterized by high blood pressure, possible convulsions, coma, and even death. Prevention of the more severe effects of this disease involves early delivery, with concomitant risk to the baby. Failure to act in this situation for fear of abridging the rights of the fetus could result in death of mother and fetus. This bill, then, would create impossible dilemmas for the practicing physician trying to meet his or her ethical responsibilities to act in the best interest of the pregnant woman. Many diseases of pregnant women require procedures or medicines which pose a risk to the fetus. Examples include appendicitis and other abdominal surgery in the pregnant woman. Medications such as dilantin for the treatment of epilepsy and cortisone-like drugs for other conditions are necessary in the interest of the pregnant woman and pose an increased risk of fetal abnormalities. These are clear cut instances in which the physician has traditionally acted in the best interest of the pregnant woman. The proposed legislation would restrict this freedom.

Previously, I referred not only to the concern pregnant women have for their health but also their desire to have healthy children. Inherent in this is the desire of many women not to have a defective or severely handicapped child. Fortunately, we now have the capability of identifying a number of these defects in early pregnancy and offering a pregnant woman a chance to make the critical decision as to whether or not she will bear a defective child. Such a situation is seen in Tay-Sachs disease. A child born with Tay-Sachs disease is doomed to die in early childhood. Are we to deny the woman the option to avoid this tragic chain of circumstances for her and the rest of her living family?.

Women in today's society constitute an increasing part of our work force. As a result many are postponing childbearing and are still completing families after age 35. At this age, they are at increased risk that their pregnancy will have a genetic abnormality, Down's Syndrome, and current practice mandates that we offer them the opportunity for screening for these unfortunate occurrences. The proposed legislation would essentially nullify our current efforts at genetic screening programs.

Thus far I have spoken only to the impact of this legislation upon the pregnant woman. The woman who is not pregnant also has a vital and justified interest in the maintenance of good health which will be impacted by this legislation. For over 10 million women in this country, the exercise of self-determination includes management of their reproductive functions by means of the intrauterine device and the birth control pill. If the legislation as proposed were to pass, any known contraceptive which interferes with the development of the conceptus would be suspect. Consequently, I believe that it is realistic to assume that the IUD and the low dose oral contraceptive pills could be considered as abortifacients and therefore declared illegal. In fact, this objective was stated in testimony before the House Subcommittee on Health and the Environment just last month by proponents of this legislation. This Subcommittee, the Senate as a whole, and the people of this country must be made aware of the impact that removal of these popular and effective birth control methods would have. If this legislation is passed and if a state views the intrauterine device as an abortifacient, what will I as a physician do when a pelvic examination reveals that my patient has an IUD in place? Do I remove it? Do I request that she have it removed? What if she refuses? Do I report her to a law enforcement agency? Or am I indeed a party to a criminal act if I do not report her?

Mr. Chairman, these are just the highlights of our concerns about the problems which would be created by passage of this legislation. There are also complicated medical issues which would arise immediately, regardless of what approach the state legislatures might take. If the federal statute defines as human life any conceptus, regardless of health, defect or condition of dependancy, we must consider how the medical profession will deal with the relatively frequent incidence of ectopic pregnancy, where the conceptus develops outside the uterus, or the hydatidiform mole, which is a product of conception that cannot survive, or the spontaneous abortion.

Great progress has been made in improving the quality and manner of delivery of health care for women in this country. Maternal mortality and infant mortality are the lowest in the history of this nation. To introduce into this improved environment of health care a factor as threatening as that involved in a new definition of personhood is to push backward that history of progress.

I encourage you to consider not only the primary goal of this legislation, but also its impact; in fact, I believe that you will find, as we have found in the American College of Obstetricians and Gynecologists, that regardless of the issue of abortion, this legislation presents a range and depth of problems so complicated and so far-reaching as to obscure the basic intent of the legislation. State governments would be enabled to intrude into the most personal and private decisions of pregnant and non-pregnant women. As a physician, as a citizen and as the President of the American College of Obstetricians and Gynecologists, I ask that you acknowledge and assess the fundamental medical changes and critical side effects inherent in this legislation.

It is heartening to be invited to testify. The emotions generated by the underlying debate have made it difficult to focus attention on the many other ramifications of this bill. This has indeed been an opportunity to expose the Subcommittee to the full measure and import of the issues surrounding this legislation in order that your votes will be assured to be informed votes.

AMERICAN HOME ECONOMICS ASSOCIATION

2010 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/862-8300

June 18, 1981

The position of the American Home Economics Association (AHEA) remains one of pro-choice--voted by its Assembly of Delegates, July 1971. This resolution states:

> "Whereas, unlimited population growth with its concomitant potentials is hazardous to world and national well-being, and
> Whereas, a responsible position concerning abortion should be based on a consideration of the rights of the individual woman, her family, and society, and
> Whereas, the present legal structure in many states fosters illegal abortions under hazardous conditions; therefore, be it
> Resolved, that the American Home Economics Association support the repeal of laws restricting or prohibiting abortions performed by a duly licensed physician."

The American Home Economics Association believes that parents who know from diagnostic analysis that the fetus is seriously defective must have the option of deciding to abort versus carrying to full term a handicapped child.

Families have a right to life too--and the physical, financial, emotional and mental burdens for families to assume, sometimes for 75-80 years, across two generations, are immense.

The impact of a handicapped individual on the entire family constellation and on the nation's social and economical resources merits consideration.

Kinsey B Green
Dr. Kinsey B. Green, Executive Director

HOME ECONOMICS: CHANGE • CHALLENGE • CHOICE
The 72nd AHEA Annual Meeting and Exposition
June 22-25, 1981 — Atlantic City, N.J.

DIVISION OF PSYCHOLOGY OF WOMEN (Div. 35)
of the
American Psychological Association

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Testimony of the Division of the Psychology of Women
of the American Psychological Association on S.158
"Human Life Statute" before the
Subcommittee on the Separation of Powers
Committee on the Judiciary
United States Senate
Honorable John East, Chairman

The Human Life Statute, S.158, defines human life as beginning at conception. The Congressional hearings on the proposed amendment have focused on the validity, from a scientific view, of that definition, one underlying issue being the point at which personhood is conferred upon the fetus determines the point at which abortion is unacceptable.

As the National Academy of Sciences has already stated, the definition of "person" and the determination of when "actual" human life begins is not a scientific question. It is, instead, an ethical and theological question. Science can, however, indicate the likely consequences of defining personhood as occurring at conception and making abortion illegal and defining personhood as occurring at birth and making abortion legal.

There is consensus among mental health professionals that rendering abortion illegal would have serious and adverse consequences to the mental health of women and children. For that reason, after serious consideration of the issue, the American Psychological Association (APA) passed the following resolution in 1969:

> "whereas, in many state legislatures, bills have recently been introducted for the purpose of repealing or drastically modifying the existing criminal codes with respect to the termination of unwanted pregnancies; and whereas, termination of unwanted pregnancies is clearly a mental health and child welfare issue, and a legitimate concern of APA; be it resolved that termination of pregnancy be considered a civil right of the pregnant woman, to be handled as other medical and surgical procedures in consultation with her physician,

> and should be considered legal if performed by a licensed physician in a licensed medical facility."

This statement represents the view of the Division of the Psychology of Women of APA, the organization of psychologists concerned with the science and practice of psychology as it relates to women's lives. It documents the mental health implications of restrictive abortion policies upon the two groups of citizens most affected by those policies: women desiring abortions and unwanted children born to women denied abortions.

The mental health implications of making abortion illegal for women are numerous and significant. Terminating an unwanted pregnancy is a serious, often agonizing decision, even in a context where the option of abortion is a legal one. The decisions are based on a variety of factors, but primary among them is the woman's perception of her ability to adequately care for a child. The data suggest that a woman's evaluation of that ability is accurate.

Abortion is sought most often by poor women, young girls, unmarried women, women over forty, and women pregnant due to rape and incest. The Hawaii Pregnancy. Birth Control, and Abortion study authors report "women who carry their pregnancy to term seem to have relatively stable family situations into which to bring children, while abortion tends to be chosen by women who do not have those family conditions" (Steinhoff, Smith, and Diamond, 1972).

Denying abortion--forcing women to carry unwanted pregancies to term and to, subsequently, shoulder the responsibility of caring for the unwanted children they bear--has direct mental health implications for women; these may include impaired ability to parent, depression, anxiety, reduced self-confidence, and loss of autonomy. These effects are particularly true for women with few child-rearing resources.

In addition, bearing unwanted children indirectly contributes to poor mental health for women by restricting women's access to and advancement in paid jobs outside the home. The Subpanel on the Mental Health of Women of the President's Commission on Mental Health underscored the detrimental effects to mental health of the low social, economic, and occupational status of women, relative to men.

The relationship between low socio-economic status and unwanted children is well illustrated by the typical teenage mother. Pregnant teenagers typically drop out of school and, when employed, are employed in low-paying jobs. About one-half of all teenage mothers are receiving Aid for Dependent Children monies.

Prior to 1973, when abortion was illegal, many women continued to seek and many obtained abortions. The mental health consequences of engaging in physically dangerous and illegal behavior are significant. Although we do not have data based upon large-scale studies to document the effects fully, clinical evidence indicates women experience fear, guilt, depression, anxiety, and isolation. Clinical evidence also suggests women who give up children for adoption suffer some detrimental effects to their mental health, although the extent and form of these effects are not known.

These adverse reactions, when compared to the more typical transitory depression and relief associated with obtaining legal, first-trimester abortions, illustrate that the mental health consequences of abortion largely depend on the social context in which the decision to obtain an abortion is made.

The mental health implications of making abortion illegal are also varied and significant for unwanted children. When children born to women denied abortion are compared with similar wanted children, they have a higher incidence of illness, poorer school achievement, and poorer integration into their peer groups. Further, boys born to such women are "more endangered in the development of their personality than girls" (Dytrych, Matejcek, V. Schuller, David, and Friedman, 1975, p. 165). Although no extreme psychological malfunctioning can be attributed exclusively to "unwantedness," the mental health of unwanted children is more at risk than the health of wanted children.

The mental health consequences of making abortion illegal for some unwanted children include high risk for neglect, abuse, illness, and psychological isolation. The mental health of children of women with few child-rearing resources, especially children born to teenage mothers, are particularly vulnerable. These children are more often victims of child neglect and abuse than are other children. In addition, they are often more difficult to care for than other children, having more illnesses and defects, including mental retardation, rendering them more susceptible to stress and poor mental health.

The mental health consequences for women obtaining abortions are generally benign. Recent reviews of the literature indicate women receiving therapeutic abortions experience more favorable than unfavorable effects. Although the act of terminating a pregnancy is associated with depression and loss for most women, these feelings are typically transient. The 1975 National Academy of Sciences report summarizes the research findings:

> There probably is no psychologically painless way to cope with an unwanted pregnancy whether it is voluntarily interrupted or carried to term. While an abortion may elicit feelings of guilt, regret, or loss, such alternatives as entering a forced marriage, bearing an out-of-wedlock child, giving up a child for adoption, or adding an unwanted child to a family may also be accompanied by psychological problems for the woman, the child, and the family (p.88).

Evidence suggests, further, that obtaining a first-trimester abortion is less of a hazardous mental health risk than childbearing.

It is clear, however, that there is a minority of individuals, strongly opposed to abortion, who find nonrestrictive abortion policies disturbing and stressful. Abortion, as such, is a divisive social issue.

It is our view that the mental health of the greatest number of Americans would be enhanced by a more constructive approach than the proposed legislation. Such an approach would focus on generating social policies which contribute to the personal growth and family stability of women thus lessening the likelihood of unwanted pregnancies and weakening the need and motivation to terminate pregnancies. The Division of the Psychology of Women of the American Psychological Association would be pleased to participate in the development of such policies.

* * * * * *

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STATEMENT OF AMERICAN PUBLIC HEALTH ASSOCIATION
BEFORE
SEPARTATION OF POWERS SUBCOMMITTEE
SENATE JUDICIARY COMMITTEE

Established in 1872, the American Public Health Association (APHA) is the oldest and largest professional society of public health workers in the world. Its aggregate membership numbers over 55,000, including 51 state and local affiliate organizations. The collective membership represents more than 45 disciplines and specialties in public health. Members include physicians, nurses, epidemiologists, social workers, sanitarians, statisticians, and many from other health-related disciplines.

APHA is devoted to the universal protection and promotion of public health, and the equality of health services for all persons. It was the first national organization of health professionals to publicly recognize that the illegality and inaccessibility of abortion had a deleterious impact upon women's general health.

As early as 1968, several years before the Supreme Court's landmark rulings, APHA supported the principle that abortion should be a matter of choice for all women. In 1973, APHA stated that, "Laws permitting abortion should be fully implemented in order to assure that every woman who desires to terminate an unwanted pregnancy has prompt, dignified, and humane access to a medically safe abortion." A 1974 APHA resolution clearly states that the Association "opposes any amendment to the Constitution of the United States, or any act of Congress, or action by any federal agency, which would prohibit performance of abortions."

Prior to the legalization of abortion, it was estimated that from 200,000 to 1,200,000 American women obtained illegal abortions yearly. These abortions were the major cause of death among pregnant women. In the two years following the 1973 Supreme Court abortion decisions, American women and their families have experienced the positive benefit of an 85% reduction in deaths from illegal abortion. If women are once again denied, safe, legal abortions, we will see a corollary rise in the incidence of maternal mortality and morbidity. For this reason, the American Public Health Association is strongly opposed to S. 158, the Human Life Statute, and any other measure that would deny abortions to American women.

Testimony by
Leon Shull
National Director
Americans for Democratic Action
on Senate Bill 158
June 1981

Americans for Democratic Action is the nation's foremost liberal organization, with chapters across this country. We are angered to see the current legislation before the 97th Congress calling for a "human life statute." This bill, opposed by all pro-choice supporters, declares that personhood begins at the time of fertilization. In effect, S. 158 would allow states to make abortions illegal and to prohibit the use of several birth control devices, sending thousands of pregnant women to the knives of back-alley abortionists, and infringing on women's religious beliefs and their right to privacy.

Having children should be a personal choice -- not a government dictate. Private citizens and experts may differ over which pregnancies can be aborted, but defining the beginning of life as conception would allow no exceptions. This measure circumvents the problems of passing a constitutional amendment prohibiting abortion. S. 158 attempts to make the "potential life" of the embryo more significant than the life of the living woman, producing many legal and constitutional ramifications with far-reaching repurcussions which supporters of the bill have not yet considered.

S. 158 rigidly defines the beginning of human life or personhood; but even among medical experts no general consensus has emerged. There is an enormous difference between the "potential" for human life, which exists once an egg is fertilized, and actual human life.

Even if the beginning of life can be agreed upon, what of that life once it has begun? Anti-abortionists are concerned about the sanctity of life, yet they fail to consider its quality. Many families cannot afford another mouth to feed, another body to clothe, and are incapable of giving additional love; should a child be subjected to life lacking these essentials? Other children, inheriting devastating birth defects and disease, bring emotional pain to themselves and their families, and face lifetimes of dependency. Life often is a severe challenge for those equipped to deal with it, but for others it is a nightmare. Many unwanted handicapped children find themselves in already over-populated institutions, waiting to be adopted; many others spend their lifetime in barren custodial care. Without legal abortion, the number of these children will grow, year by year.

Disagreement also exists about the politics of the abortion issue. The majority of Americans, including a majority of the delegates at the Republican National Convention favor a woman's right to choose to have an abortion.

Government should not interfere in the religious issue of abortion and human life. Beliefs differ, and the decision is a moral one which would be unconscionable for a government to dictate. S. 158 would violate Freedom of Religion and Separation of Church and State, both mandated by the First Amendment of the Constitution. Since most religions do not teach that life begins at fertilization, and most permit abortion under certain circumstances, this statute would infringe upon women's constitutional rights to freely practice their religion. Many religious leaders support abortion in instances of life endangerment, rape, incest, and fetal deformity. A 1980 Gallup Poll indicated that 77 percent of Catholics -- the religion most intensely opposed to abortion -- favored abortion and contraception in at least some cases. No religious mandate exists for Congress to prohibit abortion. The abortion and human life issue is so intensely personal and religious that it cannot be resolved for everyone by laws enacted by government.

The human life statute contains no exceptions for the endangerment of women's lives or cases of rape or incest. Doctors would have to ignore their better judgements in their treatment of women, in order to insure fetal safety. About 9,000 rape victims and an estimated 12,000-60,000 incest victims become pregnant each year. These women already are scarred emotionally; carrying an unwanted baby to term victimizes them once again. Many are young girls -- themselves children -- whose lives would be endangered by pregnancy and childbirth.

S. 158 not only would abolish abortion, but also would outlaw several forms of oral contraceptives and I.U.D.'s as birth control methods, since these methods prevent the implantation of fertilized eggs. These two forms are the most popular and effective, and women would be forced to use less reliable forms, bringing about further unwanted pregnancies. Ironically, illegal abortions would sharply increase in numbers, in the absence of safe, legal, and acceptable alternatives.

For abortions will not end; they will simply become illegal and dangerous. Experts, agree that where abortions are performed by untrained persons under unsanitary conditions, the mortality rate is many times higher. Deaths from illegal abortions decreased significantly after 1973 but increased once again when Medicaid funds for abortion were cut.

And women would have no alternative to abortion. Sterilization would be the only legal effective alternative; however, ADA finds this alternative unacceptable because it permanently restricts a woman's choice. Many women would face a childless life rather than produce children possibly doomed because of genetic problems causing birth defects or disease. Some women will endure dangerous "back-alley" abortions, others will travel to expensive clinics in other countries or distant cities. Still others will bring unwanted, rejected children into the world.

A human life statute would produce countless legal problems. A fetus could not be "deprived life, liberty, and property, without due process of law", according to the 14th Amendment of the Constitution. Fertilized eggs and fetuses would be covered under laws defining murder, assault, kidnapping, and other crimes involving a "person" as a victim. A crime involving a pregnant woman might become a crime against two people. The bill would also affect civil law. Could a fertilized egg sue a woman for improper treatment? Could parents of an embryo which is aborted in a traffic accident recover damages on behalf of the never born? Could pregnant women receive a tax deduction for fertilized eggs during a taxable year, even if the pregnancy ended in a miscarriage?

Enforcement of such a law would be a nightmare. Because the unborn would have the "right-to-life," the government's obligation would be to protect the fetus. It could invade women's personal lives by requiring monthly pregnancy tests for all women -- from puberty to menopause -- to ascertain the existence of this "person". It could require the registration of every pregnancy or suspected pregnancy. The government could impose safety requirements on pregnant women to prevent miscarriages, and investigate miscarriages to determine whether they were intentional. About 11 million pregnancies occur each year, and all could be subjected to constitutional protection. The privacy of the female body would be destroyed.

In its attempt to protect the life of the unborn, S. 158 violates the rights of all women. Where, in the Constitution, are we permitted to place the rights and life of one person before those of another? S. 158 is a grave threat to a woman's life, her religious beliefs, her privacy, and her physical and mental stability. S. 158, a bill whose consequences are so hazardous, is totally irresponsible and deplorable.

# # #

Americans United for Separation of Church and State
8120 FENTON STREET • SILVER SPRING, MARYLAND 20910 • (301) 589-3707

STATEMENT OF

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

ON

S. 158, THE HUMAN LIFE BILL

Americans United for Separation of Church and State opposes S.158, The Human Life Bill, because of its clearly sectarian intent to impose one theological view of personhood of a fetus on all Americans, and therefore to discriminate by religion.

Americans United is a 34-year old organization founded for the exclusive purpose of maintaining and promoting religious liberty and its First Amendment corollary, separation of church and state. The political viewpoints of our members span the entire spectrum between conservative and liberal. Hundreds of religious faiths are represented as well through our more than 90,000 members nationwide.

On the subject of abortion our members are divided. It is because of the diversity of religions and personal convictions that everyone must be free to exercise his or her own beliefs, that we oppose S.158.

Passage of this legislation would encourage states to enact laws regulating abortion, thrusting government into the lives of all Americans. It would encourage drastic changes in criminal statutes, which do not currently recognize the fetus as a person.

Government would regulate not only one of the most personal aspects of a woman's life -- self determination of her reproductive rights -- but also regulate her actions stemming from her private religious beliefs as well.

Some or all abortions would be criminalized; public services providing access to abortions would be prohibited; private services and facilities, which provide abortions could be regulated or prohibited; state officials, who fail to implement the possible resultant regulations, could be charged with a criminal felony. Other more far reaching effects are possible.

The question this bill engenders is not when life begins. Tissue is life. Any organ or cell of the body is life.

The single determination to be made is when does the fetus actually become a person. When may that quality known as "personhood" be bestowed upon a fetus? That is a theological and philosophical concept, not an issue that can be settled by legal statements or scientific data.

Scientists can describe the developmental process of gestation. But that undetermined moment at which a fetus becomes a person is not a matter that can be demonstrated by scientific evidence. The decision is bound and enmeshed in value systems based on religion.

Any attempt to explain the bill's intent through scientific facts is to support a religious supposition thus creating a "religio-scientific" theory -- a religious viewpoint entangled in medical facts. Religion and science become so entangled and intertwined that the bill, itself, presents the legislator with what becomes a constitutionally impermissable task of defining personhood.

The bill strikes at the heart of the First Amendment's guarantees of religious liberty and church-state separation -- that "Congress can make no law respecting an establishment of religion or prohibiting the free exercise thereof...." Since theologians have been arguing the abortion issue for centuries, it seems constitutionally inappropriate and unsound public policy for Congress to attempt to resolve it.

By not determining when personhood begins, the U.S. Supreme Court did not ignore its responsibility in Roe v. Wade, 410 U.S. 113 (1973). It recognized the inability of scientific experts, philosophers and theologians to come to a consensus on this point. Therefore, the Court took government out of that most private decision-making process to allow each woman to freely exercise her judgment according to her own theological and philosophical beliefs.

It is important to note here that Congress is in no way better qualified to answer this crucial question than is the Supreme Court. Congressional hearings, however numerous or wide ranging, will not produce an answer satisfactory to all Americans whcih will not impinge on their religious liberties.

The only answer, which the Court could have correctly given in our pluralistic society, is to allow each woman the constitutional right to exercise her own reproductive freedoms according to the dictates of her conscience based on her own moral and religious beliefs. In this way no woman would be forced to violate her religious principles and there would be no need for government to coerce her in favor of either alternative.

We also oppose S.158 for its procedural aspects -- removing the jurisdiction of the federal courts. This is a very dangerous method of changing current statutes and judicial opinions, setting a precedent for future legislation dealing with First Amendment issues. It is actually a back-door method of amending the Constitution itself, federal law would be frozen in these cases without a full airing in the federal structure.

We ask the subcommittee to examine carefully the evidence that has been presented to them during the hearings which reveal the serious constitutional problems of this bill -- not only redefining personhood as beginning at the moment of conception, but also the judicial problems of limiting the jurisdiction of the federal courts. We urge you to oppose S.158.

Association for Women in Psychology

STATEMENT OPPOSING S158

The Association for Women in Psychology (AWP) is a national, not-for-profit scientific and educational organization devoted to:

a. ending the role psychology has had in perpetuating unscientific and unquestioned assumptions about the "natures" of women and men;

b. encouraging feminist psychological research on sex and gender;

c. encouraging research and theory directed towards alternatives to stereotyped sex roles, child-raising practices, non-sexist life-styles and new vocabularies;

d. expanding opportunities for women to achieve equality within the science and profession of psychology;

e. educating and sensitizing psychologists and the public to the psychological, social, political and economic problems of women;

f. ending the use of "mental health" professions and psychotherapy as a means of enforcing institutionalized sexism;

g. helping women create individual sexual identities through which they may freely and responsibly express themselves (provided such expression does not oppress other individuals).

The membership of AWP includes both women and men, professional psychologists as well as interested professionals in related fields, students, and consumers of psychological services. The members reside and work throughout the United States. Regional groups are currently active in Metropolitan New York, New England, and the western states.

The Association for Women in Psychology condemns S.158 or any other form of the so-called Human Life Statute as detrimental to the psychological, physical, and spiritual well-being of American women. The S158 and other proposed laws which attempt to define "person" to include "human life from the moment of conception" are dangerous attacks on the right to choose abortion as well as on the constitutional protection of women's right to privacy and of all individual rights. These laws are furthermore incompatible with the goals and principles of AWP. In order for women to have equal opportunity to seek life, liberty, and the pursuit of happiness, we must perpetuate the right of choosing when or if we will bear children, including terminating an unplanned pregnancy. We must not consider only the life of a hypothetical unborn child, but, more importantly, the very real human lives of those of us who are the actual citizens of this country. What distinguishes us from what are called the "lower animals" is the ability to make intelligent choices in the creation of our destinies. Furthermore, it should be the right of every child to be born into a family which has the emotional, social, and financial resources to provide it with a life of finer quality than brute survival.

It is a sad commentary on our times that such a tyrannical legislative suggestion could be considered at high governmental levels. The fact that very few women are involved in these levels of government is undoubtedly a factor in such anti-woman legislation. We insist that wiser and more democratic views amongst our elected representatives must prevail, and that so-called Human Life Statutes will shortly become an issue of the past.

For further information or comment, contact:

Joan R. Saks Berman, Ph.D.
Chair, Reproductive Rights Committee
P.O. Box 2228
Tuba City, AZ 86045

HUMAN LIFE LEGISLATION

MY NAME IS EDNA WOLF. I AM THE EXECUTIVE DIRECTOR OF B'NAI B'RITH WOMEN, AND I AM TESTIFYING ON BEHALF OF GRACE DAY, OUR NATIONAL PRESIDENT, IN OPPOSITION TO LEGISLATION DESIGNED TO DENY WOMEN THEIR CONSTITUTIONALLY PROTECTED RIGHT TO ABORTION AND FAMILY PLANNING.

FOUNDED IN 1897, BBW IS A JEWISH ORGANIZATION OF 130,000 MEMBERS WHOSE COMMITMENT TO THE COMMUNITY IS DEMONSTRATED THROUGH A WIDE RANGE OF PROGRAMS AIMED AT PROMOTING HUMAN UNDERSTANDING. IN ADDITION TO BEING INVOLVED IN EDUCATIONAL PROGRAMS ON HUMAN RELATIONS ISSUES OF OUR TIME, OUR MEMBERS ARE ALSO ACTIVE IN SERVING THE NEEDS OF INDIVIDUAL COMMUNITIES IN HOSPITAL CENTERS FOR THE MENTALLY DISTURBED, IN HALF-WAY HOUSES AND OTHER INSTITUTIONS.

OUR MEMBERSHIP IS BY NO MEANS HOMOGENOUS IN TERMS OF SPECIFIC JEWISH RELIGIOUS GROUP AFFILIATION. B'NAI B'RITH WOMEN BELONG TO ANY OF THE THREE MAIN BRANCHES OF CONTEMPORARY JUDAISM RANGING FROM THE ORTHODOX TO THE CONSERVATIVE TO THE REFORM. AS YOU ARE AWARE, THE ORTHODOX ADHERE STRICTLY TO THE WORDS OF THE HEBREW BIBLE, OR THE TORAH, APPLYING ITS PRINCIPLES AND REGULATIONS TO MODERN LIVING. THE CONSERVATIVE ALLOW FOR SOME DEPARTURE FROM STRICT ADHERENCE TO THE TORAH AND TALMUD, TWO OF OUR MOST SACRED BOOKS, IN KEEPING WITH CHANGING TIMES AND CIRCUMSTANCES. THE REFORM RETAIN THE SPIRIT AND PHILOSOPHY OF JUDAISM WHILE ADOPTING A LIBERAL APPROACH TO RITUAL. OUR ORGANIZATION IS SIMILAR TO OTHERS IN

THAT IT ADOPTS POLICIES WHICH ARE MINDFUL OF THE INDIVIDUAL BELIEFS OF ITS MEMBERS, AND CAREFUL THAT THEY BE ACCEPTABLE TO ALL. SINCE 1968 OUR EXECUTIVE BOARD AND OUR DELEGATE ASSEMBLY HAVE PASSED SEVEN RESOLUTIONS WHICH HAVE RESULTED IN OUR INVOLEMENT IN THE STRUGGLE TO ENSURE WOMEN THE RIGHT TO TERMINATE PREGNANCIES. OUR POSITION WAS NOT REACHED BY ARBITRARY JUDGEMENT NOR WAS IT INFLUENCED BY CHANGING LIFESTYLES AND MORES. IT IS FIRMLY BASED UPON JUDAIC PRINCIPLES AS ESTABLISHED BY THE TALMUDIC INTERPRETATION OF THE TORAH -- OR THE HEBREW BIBLE -- BY THE MOST AUTHORITATIVE RABBIS OF OUR TRADITION.

JUDAISM IS MORE THAN A RELIGION. IT IS A WAY OF LIFE AND A PHILOSOPHY OF LIFE. IN ALL ITS ASPECTS, IT IS PRO-LIFE IN THAT IT SANCTIFIES HUMAN EXISTENCE TO THE UTMOST DEGREE. THE LAWS DEALING WITH HYGIENE AND NUTRITION CONTAINED AT RANDOM IN THE BOOKS OF LEVITICUS AND DEUTERONOMY WERE DESIGNED TO FOSTER HEALTH AND THE PROLONGATION OF LIFE. GIVEN AS A DIVINE COMMANDMENT, THE PRESERVATION OF HUMAN LIFE ASSUMED THE CHARACTER OF A RELIGIOUS RESPONSIBILITY AND A WAY TO SERVE GOD. IMPLICIT IN THE COMMANDMENT WAS THAT THE HIGHEST QUALITY OF LIFE BE ACHIEVED, AND THE COMMON GOOD BE SERVED. THE ROLE OF RABBIS IN INTERPRETING THE HEBREW BIBLE THROUGH THE TALMUD WAS TO ENSURE THAT THE DIVINE GUIDELINES WOULD BE FOLLOWED THROUGH. THUS IN ADVISING A PREGNANT WOMAN WHETHER OR NOT TO TERMINATE A PREGNANCY, OUR RABBIS WEIGHED CAREFULLY HER INTERESTS WITH THOSE OF THE DEVELOPING CELL WITH A POTENTIAL TO A SEPARATE

EXISTENCE, WHICH SHE CARRIED. THAT THE LIFE OF THE MOTHER ALWAYS TRANSCENDS THAT OF THE CHILD BECAME THE GUIDING JUDAIC PRINCIPLE IN SOLVING THIS DIFFICULT DILEMMA. SUFFICE IT TO CITE TWO OF THE MANY TALMUDIC RULINGS ON THE SUBJECT: "IF A WOMAN TRAVAILS TO GIVE BIRTH [AND IT IS FEARED SHE MAY DIE] ONE MAY SEVER THE FOETUS FROM HER WOMB AND EXTRACT IT MEMBER BY MEMBER, FOR HER LIFE TAKES PRECEDENCE OVER HIS" (OHOLOT 7:6). THE FOETUS "MAY BE KILLED AND THE MOTHER SAVED" RULED A RENOWNED 11TH CENTURY FRENCH RABBI BY THE NAME OF RASHI (SANHEDRIN 72b).

JUDAIC RULINGS ON ABORTION AND CONTRACEPTION WERE CLEARLY DICTATED BY A CONCERN FOR THE WELFARE OF WOMEN. ADVANCEMENTS IN MEDICAL KNOWLEDGE HAVE ADDED A NEW DIMENSION TO THE ABORTION ISSUE: THE HEALTH OF THE FOETUS. THE PRESENCE OF A GENETIC DISEASE IN THE FOETUS, SUCH AS TAY-SACHS, CAN USUALLY BE DETECTED FIFTEEN OR SIXTEEN WEEKS AFTER CONCEPTION. ADDRESSING HIMSELF TO SUCH SITUATIONS, RABBI DAVID H. FELDMAN, A CONTEMPORARY AUTHORITY ON JEWISH MEDICAL ETHICS, REITERATED THAT "THE WOMAN'S WELFARE IS PRIMARY... DECISIONS ABOUT ABORTION MUST BE MADE RELATIVE TO THE MOTHER'S WELFARE, BE IT PHYSICAL OR EMOTIONAL." THE RECOGNITION OF THE MENTAL ANXIETY AND OTHER DIFFICULTIES WHICH CAN OVERWHELM A FAMILY IN WHICH AN ABNORMAL CHILD IS BORN IS AT THE SOURCE OF SUCH THINKING.

THE LEGISLATION UNDER CONSIDERATION THREATENS THE RIGHT OF INDIVIDUAL WOMEN TO FAMILY PLANNING THROUGH BIRTH CONTROL AS WELL AS THEIR RIGHT TO HAVE ABORTIONS. THE ISSUE CEASES TO

BE MERELY MEDICAL AND PSYCHOLOGICAL. IT BECOMES SOCIAL, ECONOMIC, AND POLITICAL. STATISTICS HAVE SHOWN THE DIRECT CONNECTION BETWEEN BIRTHRATES AND THE EDUCATIONAL AS WELL AS THE ECONOMIC LEVEL OF WOMEN. MOTHERS WHO GIVE BIRTH AT AN EARLY AGE ARE LESS LIKELY TO GRADUATE FROM HIGH SCHOOL AS MOTHERS WHO POSTPONE CHILDBEARING. CONSEQUENTLY, MOTHERS WHO CONTINUE TO HAVE CHILDREN WILL BE LESS LIKELY TO ENGAGE IN EDUCATIONAL PURSUITS LATER ON BECAUSE OF OBVIOUS CHILDCARE RESPONSIBILITIES, MORE OFTEN THAN NOT ADDED TO POOR ECONOMIC CONDITIONS. KEEPING WOMEN "BAREFOOT AND PREGNANT" WOULD EFFECTIVELY PREVENT THEM FROM COMPETING WITH MEN ON THE JOB MARKET. THAT IT WOULD NOT BE IN THE BEST INTEREST OF THE ECONOMY SHOULD BE MADE CLEAR.

TEENAGE PREGNANCIES ARE A SERIOUS PROBLEM IN THIS COUNTRY. ORGANIZATIONS INVOLVED IN ATTEMPTS TO SOLVE IT HAVE REPORTED POSITIVE RESULTS. IT APPEARS THAT CONTRACEPTIVE USE BY TEENAGERS HAS PREVENTED 680,000 PREMARITAL PREGNANCIES IN A SINGLE YEAR. THE U.S. TEENAGE BIRTHRATE HAS DECLINED, YET, IT IS STILL AMONG THE HIGHEST IN THE WORLD. WE SIMPLY CANNOT AFFORD NOW TO STOP EFFORTS THAT HAVE BEEN SUCCESSFUL IN ENABLING HUNDREDS OF THOUSANDS OF TEENAGERS TO RESUME NORMAL LIVES IN WHICH ALL HOPES AND EXPECTATIONS ARE AGAIN MADE POSSIBLE.

THOSE WHO OPPOSE FREEDOM OF CHOICE ON ABORTION AND BIRTH

CONTROL CALL THEMSELVES "PRO-LIFE." THIS IS SIMPLY THE EPITOME OF IRONY AS WELL AS OF IRRESPONSIBILITY. IS IT PRO-LIFE TO POTENTIALLY DESTROY THE LIVES OF TEENAGERS WHO ARE PHYSIOLOGICALLY AS WELL AS PSYCHOLOGICALLY TOO YOUNG TO SAFELY BEAR CHILDREN? IS IT PRO-LIFE TO CONSCIOUSLY PERPETRATE A CYCLE OF POVERTY AMONG WOMEN WHO MAY NEVER DEVELOP A CHANCE TO DEVELOP SKILLS OTHER THAN THOSE OF BABY MACHINES? IT IS OUR CONCERN FOR LIFE WHICH COMPELS US TO OPPOSE LEGISLATION THAT WOULD NOT ONLY VIOLATE THE CONSTITUTIONAL RIGHTS OF WOMEN, BUT ALSO JEOPARDIZE THE QUALITY OF THEIR LIVES.

WE ARE RESPECTFUL OF THE RELIGIOUS CONVICTIONS OF THOSE WHO DO NOT SHARE OUR VIEW ON THE ISSUE OF ABORTION AND BIRTHCONTROL. HOWEVER, OUR NATION IS A PLURALISTIC SOCIETY MADE UP OF A WIDE VARIETY OF RELIGIOUS GROUPS. IT IS OUR BELIEF THAT THE STATE HAS NO RIGHT TO IMPOSE UPON ALL THE CITIZENS OF THIS COUNTRY THE RELIGIOUS CONVICTIONS OF ONE PARTICULAR GROUP OVER ANOTHER. TO PASS LEGISLATION THAT WOULD ACHIEVE SUCH A GOAL WOULD BE TO DISCRIMINATE AGAINST THE MAJORITY OF AMERICANS. WE URGE YOU TO RESPECT THE RELIGIOUS BELIEFS OF ALL AMERICANS BY MAINTAINING THE STATUS QUO. IN SO DOING, CONGRESS WILL FULFILL GOVERNMENTAL RESPONSIBILITY TOWARDS THE PEOPLE BY PROTECTING THE RIGHTS OF ALL.

Catholics for a Free Choice
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Statement by
Catholics for a Free Choice
in Opposition to S.158
Before the Senate Judiciary Committee
Subcommittee on Separation of Powers
June, 1981

As demonstrated recently in the overwhelming rejection of an attempt to curtail abortion rights in Italy, Catholics believe that abortion is a private matter, and one where neither church nor state has jurisdiction. Similarly, in the United States, more than three-fourths of the 50 million Catholics subscribe to the principle that abortion should be legal. (Gallup, 1980)

In almost two thousand years of moral and theological debate, aided by the developing biological sciences, the hierarchy of the Roman Catholic Church have been unable to arrive at a consistent and universally held opinion on when human life begins. In those same years, the people of the Catholic Church -- the living and actual church -- have followed their consciences on the question of when life begins. Catholics are not different from people of other faiths: they will obtain abortions as a last resort; they will use birth control methods which act as abortifacients; and they will reserve those decisions concerning human reproduction to the privacy of the individual woman.

Scientific Objections

We are not doctors; we are people of faith. We can only add our doubts about S.158 to those expressed to this Subcommittee by experts in life sciences who maintained there is no consensus in the medical community on when actual human life begins. Neither is there consensus in the religious community, or among Catholics, though our bishops proclaim unanimity. Catholics themselves have agreed to disagree. We affirm the necessity for individual conscience to decide its course in greatly varying situations.

Religious Objections

With all due respect, we must remind this Subcommittee of the lessons of our own church history. Our theologians found little to be gained from framing unanswerable questions, such as, "How many angels can stand on the head of a pin?" So may a legislative body find that it can not by fiat put an end to thousands of years of philosophical speculation on the origins and meaning of life.

Our greatest theologians, St. Augustine and St. Thomas Aquinas, both stated that actual human life began not at conception but some time later, when there was sense as well as life in the fetus. For this reason, Catholic churchmen have never officially and infallibly stated that life begins at conception but some time later, when there was sense as well as life in the fetus. For this reason, Catholic churchmen have never officially and infallibly stated that life begins at conception, though they, like all of us, speculate at length on the question. Does the

U.S. government wish to step in to legislate where many fine and devout people of God would either disagree as in the case of Augustine and Aquinas, or admit simply that they do not know?

We would hope that a legislative body would direct its attention to the work of guaranteeing citizens of the polis a decent, healthful, productive life.

Theoretically, Catholics do not need an S.158. Our church already forbids abortion, and contraception as well. Yet statistics gathered by Catholic sociologist Andrew Greeley, who is himself a priest, show that 76.5% of Catholic women in this country use birth control despite church condemnation, and almost as great a percentage of Catholic priests support that choice.

Most significant are the polls showing Catholic support of abortion rights. Gallup in 1980 found that 77% of American Catholics believed a woman had a right to seek an abortion under some or all circumstances. These millions of Catholics all theoretically face excommunication for their beliefs, yet the hierarchy proves unwilling to force this issue within the church, choosing rather to press it in the public policy arena.

Our question is an obvious one: if the great moral and theological authorities of the Catholic Church have failed to persuade obedience from Catholics on this issue, should a government, "by, of and for the people" step in and attempt such coercion? Catholic women, like all women who need abortions, today as always, will obtain abortion. A woman who acts to protect her life, her liberty and the security of her family will not be stopped. She can, however, be punished for the audacity of taking the issue straight to God without asking the permission of her Senator. This is what S.158 would provide.

Constitutional Objections

Catholics for a Free Choice also opposes S.158 on the grounds that such a bill incorporates a sectarian notion, best confined to religious persuasion, into law, and thereby intrudes upon the religious liberties of the majority of citizens. S.158 reflects the religious, quasi-scientific viewpoint of a few. Even the majority of the 50 million American Catholics, whose leaders may support a total ban on abortion, do not themselves agree with the Roman Catholic hierarchy on questions of birth control and abortion.

S.158 is bad science and worse theology. It can only be construed as a particularly imaginative method for circumventing the provisions of the U.S. Constitution which allow for amendment. For this reason, in addition to the previously stated religious, scientific and constitutional objections, CFFC opposes passage of S.158, as such passage is a threat to the separation of powers provided for in the U.S. Constitution.

Summary

As our sisters and brothers in Italy stated so graphically in May of this year: when actual human life begins is an abstract question subject to sincerely held and diverse interpretations. But, abortion is a need, and has been a fact throughout history.

The question then for lawmakers is whether to criminalize those women who, like their mothers through all time, will obtain an abortion no matter what the risks or penalties. We submit that rather than focus the vast resources of the U.S. government on punitive measures against these women, it is the responsibility of the U.S. Congress to bring about a society in which no citizen is so desperate as to risk life and liberty rather than carry a problem pregnancy to term.

S.158 does not address any of the deep human needs of our society; on the contrary, its effect will be to perpetuate suffereing. [The attached booklet, "The History of Abortion in the Catholic Church, The Untold Story" is submitted for the record as part of this statement.]

* * * * * *

Catholics for a Free Choice is a national membership organization, with a grass-roots network of twenty-one Community Contacts in seventeen states. CFFC advocates sex education programs for young people, access to birth control, and the guarantee of legal, safe abortion for any woman who is in need of such a procedure. CFFC is dedicated both to upholding the 1973 decision which legalized abortion, and to the principle of separation of church and state.

the
Center for
Population
Options

TESTIMONY OF THE CENTER FOR POPULATION OPTIONS
Submitted to the
SENATE JUDICIARY COMMITTEE, SENATOR STROM THURMOND, CHAIRMAN
SUBCOMMITTEE ON THE SEPARATION OF POWERS, SENATOR JOHN EAST, CHAIRMAN

The Center for Population Options (CPO) is deeply disturbed by S.158 and the severe restrictions it would impose on the fertility options of millions of Americans. CPO is especially concerned that such a law would force pregnant teenagers to become parents before they are truly able to undertake this task. For pregnant women of all ages, abortion is the only alternative to childbearing and as such must be kept safe and legal. We urge Congress to preserve the individual's right to decide upon the option that is best for her and her family.

CPO is the only national organization with the primary purpose of preventing unwanted pregnancy and childbearing among adolescents. The physical, personal and economic costs of these conditions can be great for adults, but they are multiplied for teenagers. For example, teenage childbearing carries a greater risk of maternal and infant mortality and morbidity; pregnancy is the greatest cause of school discontinuation among teen women and teenage marriages, especially those precipitated by an unwanted pregnancy, are more likely to end in divorce and are economically disadvantageous in terms of occupation and income.

Working through television, radio and youth serving agencies that together reach millions of teens across the country, CPO's programs seek to prevent pregnancy among adolescents by informing them of the facts and responsibilities of sexuality and parenthood and encouraging them to make responsible decisions about these vital life concerns.

Largely as a result of greater availability of sexuality education and family planning services, contraceptive use among sexually active teenagers is increasing. But for a variety of reasons - incomplete information, method failure and risk-taking to name a few - nearly one million teenagers a year experience an unplanned pregnancy. For some teens, parenthood may be appropriate; for others, adoption; but without unrestricted access to safe and legal abortion services, there are no options for other pregnant teens, only forced childbearing. We believe that childbearing is a serious undertaking, especially for teenagers, that should be carefully chosen by an individual and her family; it should not be legislated.

CPO's Board of Directors supports access to safe and legal abortion services for Americans of all ages and has placed a priority on programs that seek to guarantee such access. The passage of S.158 would deny such access and we therefore urge its defeat.

STATEMENT OF
RUTH JORDAN
COALITION OF LABOR UNION WOMEN

June 10, 1981

The Coalition of Labor Union Women is an organization which represents 12,000 members of collective bargaining organizations concerned about national and economic issues which affect working women. Its national chairperson is Joyce Miller who is also a member of the Executive Council of the AFL-CIO and a vice president of the Amalgamated Clothing and Textile Workers Union.

CLUW's membership has endorsed a pro-choice position. Our concern has developed over the past several years as anti-abortion forces have attempted to limit the choices of all women and introduce their beliefs into the collective bargaining arena. We have become alarmed and have testified against efforts by these organizations to legislate against negotiated health care plans which provide for abortion. These forces have been successful in four states and would have been successful in limiting health plan benefits for Federal employees in the this session of Congress were it not for the efforts of a coalition of Federal employee unions, and women's organizations.

more

We have sought to testify before Senator East's subcommittee and prior to that, before Senator Hatch's subcommittee. We have spoken on the telephone with aides, seeking time to offer our point of view on the pending legislation. These efforts have not met with any success. We have not received a response from either Senator.

We believe the current legislation is simply another approach by anti-abortion suppoters to amend the constitution by law and to overturn the Supreme Court's decision. The Coalition of Labor Union Women considers the "beginning of life issue" to be a ruse that masks the true anti-woman agenda of conservative forces in this country. To us the issue is not a scientific one -- it is an economic question. Tens of thousands of working women -- wives and mothers and single heads of families -- believe pregnancy and "choice" can make the difference between economic survival or disaster for their families. Some feminists describe the conservative agenda as keeping women "barefoot and pregnant." We in CLUW would characterize it as part of a strategy to maintain women as a marginal, expendable workforce.

The issue for working women is an economic one. She and her family are the only ones who should decide whether or not their family should grow. That decision directly affects the economic well-being of that household. If she is a single parent, the head of a household or the major provider, then it is certainly only her decision to make. If she and her husband are both wage earners, then it is their decision together, a family decision based on their economic need, their religious beliefs and their attitudes. That is not the domain of some government official or some Congressman or Senator.

America's working women are truly pro-family. Their families survive because of their efforts. More of them are working now than ever before and the greatest percentage of increase in their participation has occurred among women with pre-school age children. Most women work because of economic need. Nearly two-thirds of all working women are single, widowed, divorced, separated or have husbands whose incomes are less than $7,000 a year.

We ask you to look at the founding principles of our nation. The right to life, liberty, and the pursuit of happiness was not intended to be limited to the fetus. More likely the founders had in mind the born infant. More likely they had in mind the conditions of that child's life, her growth, her development. If you really believe that abortion represents the taking of life, then how do you classify a Representative or Senator who permits striker's children to go hungry because they are denied food stamps? Would you call such a person a torturer? How would you classify a Representative who votes against protecting a worker from death by suffocation caused by brown lung? Would you call that person a murderer? Surely your concern about life doesn't stop after the child is born. We urge you to concentrate on the quality of life for all Americans and avoid interfering with the legitimate right of "choice " for America's working women.

Committee to Defend Reproductive Rights
of the Coalition for the Medical Rights of Women

1638 B Haight Street • San Francisco, California 94117 • (415) 552-2000

CDRR is an issue committee of the Coalition for the Medical Rights of Women, and a member of the Reproductive Rights National Network. We are Bay Area Women working to ensure that all of us have the right to choose when and if to bear children and the right to raise children. We believe that reproductive freedom is the right of women and men to decide if and when to bear and raise children. This right is meaningless without access to sex education, safe and effective methods of birth control and access to safe and affordable abortions. Women who bear children must have quality maternal, pre-natal and post-natal care, and affordable childcare. Women and men also have the right to be free from sterilization abuse, which occurs every time a person is sterilized without knowing the risks of the procedure, alternative methods of surgery and birth control, and without understanding that the procedure is permanent.

We are a grass roots organization with thousands of pro-choice citizens supporting our work. We have about 150 active members, and over 900 women and men organized into a phone tree. We network with pro-choice groups in the Bay Area and all over the State of California, and are considered one of the best organized and most effective grass roots reproductive rights groups in the United States.

Many of us can not believe that abortions will be illegal once again. We marched. We picketed. We wrote letters. And in 1973 we won the right to choose, forever. But last June we lost the right for federal funding for abortion. Last November we lost when the presidency, cabinet posts and high-ranking positions at all levels of government were filled by anti-abortionists. We lost when pro-choice legislators were targeted and defeated. We lost when the U.S. Supreme Court upheld the right of states to require parental notification of minors before an abortion can be performed. Starting April 23, 1980, Congressional hearings on the Helms-Hyde statute began which could outlaw abortion altogether.

Although it appears that the Helms-Hyde bill is unconstitutional on many levels, it is clear that the anti-abortion forces are using their single issue targeting system to blackmail many legislators into taking anti-abortion stands. This is seen in the vote to attach a rider to an appropriations bill to stop funding abortions for women who are victims of rape and incest. It is an outrage that legislators are being forced into positions, endangering the lives of women, because of politics.

If abortion becomes illegal, murder- women will rely on back-alley butchered abortions, Again 10,000 women a year will be murdered, and many thousands more maimed and scarred both physically and psychologically. Minors will be so scared they will try to self-induce or not face the realtiy of their situation till it is so late that an abortion will endanger their lives.

The Helms-Hyde bill not only deprives women of their fundamental rights, it also is pushing for a Constitutional Crisis, denying the authority of the Supreme Court and lower federal courts. We can not allow a well organized, well financed minority to re-define our Bill of Rights. We of the Pro-Choice majority will not allow this to happen. A Women's Life is a Human Life .

Episcopal Urban Caucus

National Office: Hearst Hall • Mount Saint Alban • Washington, D.C. 20016
(202) 966-7380

June 8, 1981

Dear Senator East:

I am writing to you on behalf of the Episcopal Urban Caucus to express our strong opposition to S. 158. The Episcopal Urban Caucus is a national movement of Episcopalians- bishops, priests and laity- who are committed to the mission of Christ in our nation's cities to stand with the poor and the oppressed. The EUC has regional and diocesan units as well as parishes and individual members.

Last February, our Annual Assembly passed the following resolution:

> "Whereas, the Episcopal Urban Caucus, by opposing the Supreme Court decision restricting Medicaid payments for abortions (at the Indianapolis Assembly), has affirmed freedom of choice for poor women on an equal basis with their more affluent sisters... now be it
>
> RESOLOVED, That the EUC formally expresses its strong opposition to any law, court decision or constitutional ammendment which deprives any woman of freedom of her choice with regard to abortion."

The national Episcopal Church has also gone on record in two General Conventions in favor of informed choice.

S. 158 obviously goes much further than even the restriction on Medicaid funds in its attempt to deny all women the right and the responsibility of making their own moral choices on abortion. As always, however, it is poor women who would be most oppressed by the proposed legislation- both medically and legally because of the expense involved in seeking safe medical procedures elsewhere if such procedures were not available in this country and the cost of legal services if charges were brought against them for deciding to terminate a pregnancy.

Noone - rich or poor, young or old, male or female- is "for abortion". We seek a world in which every child born will be recognized by society as infinitely precious. When"life begins" is an unknowable mystery or at best is something that each of us must discern in our own hearts and souls; there certainly cannot be a simple legislative "answer". To try to give such an "answer" will cause untold suffering to women, men and children throughout this country and be destructive of the fabric of responsible family and religious life.

Faithfully yours,

Lloyd S. Casson

The Rev. Canon Lloyd S. Casson
President

LC:AS

FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN
2000 P Street N.W., Suite 403 • Washington, D.C. 20036

Testimony of the Federation of Organizations for Professional Women
on S.158 "Human Life Statute" before the
Subcommittee on the Separation of Powers
Committee on the Judiciary
United States Senate
Honorable John East, Chairman

Submitted by

Nancy Felipe Russo, Ph.D.
President

The Federation of Organizations for Professional Women is a nonprofit educational and service organization committed to promoting equal opportunity for women in employment and education. Over 60 organizations are affiliated with the Federation in an attempt to reach this goal. Since 1978, the Federation has had a resolution supporting reproductive freedom.

The proposed statute clearly reflects a desire on the part of legislators to respond to the wishes of the 10 percent of Americans who want to eliminate abortion. As such, it is misguided. Not only does it conflict with the values of 90 percent of the population--it will not achieve the goal of the minority. Abortions will continue, albeit illegally.

What will be the consequences of the social policy that you will have the responsibility for developing? Other groups have articulately testified as to the numbers of women who may die, suffer impaired physical and mental health, and continue in a cycle of poverty as a result of your decisions on abortion policy. As you have reviewed the programs in the Federal Budget, you have seen the high cost of unwanted childbearing to American society--

it is seen in the statistics on crime, welfare caseloads, child abuse, and mental illness.

However, we would like to focus on three points that have not received much attention in the debate about abortion:

(1) the devastating impact that the inability to control reproduction has on the status of women;

(2) the devaluation of motherhood and of the family that occurs when motherhood is not a valued choice;

(3) the potential boomerang effect of policies that restrict abortion.

No analysis of the persistence and change in sex-role stereotyping and sex discrimination in society can be complete without special consideration of the role of motherhood. As William O'Neill has observed, "experience has demonstrated that the formal barriers to women's emancipation--votelessness, educational and occupational discriminations, and alike---are less serious and more susceptible to change than the domestic, institutional, and social customs that keep women in the home." It is the primacy given to the role of mother for women that must be appreciated if resistance to women's equality is to be understood.

The traditional view has been that a women can spend time working--perhaps even at a nontraditional job--as long as she keeps the house clean and her husband and children well tended. Motherhood has been on a qualitatively different plane than other things that women are "supposed to" do--it is a woman's raison d'etre. It is mandatory; and the motherhood mandate continues to be used to justify women's inequality in other domains.

Advances in the technology of family planning and abortion have theoretically eliminated the biological inevitability of motherhood. This has been crucial for motherhood to take its place as one among many options valued by society. From this perspective, it is clear that the emphasis of the women's movement on the control of one's body is not misplaced. Restrictions on a woman's ability to control her reproduction can be seen as the crucial impediment to change in "the woman's place." As long as motherhood is a mandate rather than a choice, it can be used to justify institutional discrimination that denies females equal access to education, employment, insurance benefits, and credit. How many times have you heard the argument that "we shouldn't hire a woman--after all, she'll just get pregnant"?

Ironically, not promoting motherhood as a choice for women leads to the devaluation of the role itself. There is overwhelming scientific evidence that Americans, at least, most value what they perceive themselves as freely choosing. Further, the proportion of value that we place on something is directly related to the amount of work we must do in order to achieve it. In this context, what does it mean to the institution of motherhood when restrictive abortion policies lead large numbers of teenagers to bear unwanted children--i.e., force them to become mothers?

The final irony is the potential boomerang effect of policies to restrict abortion. It is clear that unwanted pregnancy is directly related to the self-esteem, competence, and aspiration of women and girls. Developing policies that devalue the status of women in general and of motherhood in particular has implications for the development of self-worth and personal integrity of women as individuals. Such individuals are at higher risk for unwanted childbearing.

Thus, the Human Life Statute would have consequences far beyond the impact on the individual woman seeking abortion. The American public does not currently fully appreciate those consequences, but should the statute be passed, that situation would change. As that happens, the divisiveness of the abortion issue may increase.

The Federation strongly urges legislators to take a more constructive approach. The Nation is facing a severe economic crisis that unwanted childbearing can only aggrevate. We must put our energies into creative solutions directed toward solving problems rather than perpetuating or exacerbating them. Rather than seeking to ban abortions, your efforts would be more constructive if they were directed towards alleviating the conditions that promote unwanted childbearing in this society.

The Federation would be pleased to participate in a constructive process directed towards that goal.

For further information, contact: Nancy Felipe Russo, Ph.D., President, Federation of Organizations for Professional Women, 2000 P St. NW Suite 403, Washington, D.C. 202/833-4908.

Testimony Submitted to the Separation of
Powers Sub-Committee of the Senate Judiciary
Committee on the "Human Life Bill" S. 158
on Behalf of:

LA RAZA LEGAL ALLIANCE
THE NATIONAL CONFERENCE OF BLACK LAWYERS
THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
THE NATIONAL LAWYERS GUILD

Interest of Participating Organizations

LA RAZA LEGAL ALLIANCE is an organization of Latino legal workers organized to take legal and political action against the oppression and exploitation of the Latino community. It is dedicated to the struggle for democratic and human rights of all Latino people, including the right to bilingual, bicultural education, medical care, jobs, decent housing, the right to organize, emigration and immigration freedom and the right to be free from racial, sexual and national discrimination.

The NATIONAL CONFERENCE OF BLACK LAWYERS ("NCBL") is an activist legal organization of Black lawyers, law professors, Judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity, and racial and sexual equality.

The National Conference of Black Lawyers was chartered to work for the elimination of racism in the law and to address the problems of the Black community. Thus, NCBL, through its Women's Rights Task Force, is concerned with the discriminatory impact from cutbacks in funded abortions and the disproportionate impact of sterilization abuse.

The NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("ECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights and its extension to all our people -- particularly the poor and the powerless. Founded in 1951, the organization has worked to achieve these goals through litigattion and public education. Among the cases it has sponsored in this Court are Kent v. Dulles, 357 U.S. 116; Kleindienst v. Mandel, 408 U.S. 753, and Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154. Through similar means, it has sought to protect the right of reproductive freedom and the right to equal protection of the law at issue.

The NATIONAL LAWYERS GUILD ("NLG") is an organization of 7,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, racial minorities and women.

In the past dacade, its work to support the women's movement has become an organizational priority. The National Lawyers Guild, through the work of its National Committee to Combat Women's Oppression is a founding member of the Reproductive Rights National Network, and is actively involved in protection of reproductive rights for poor, minority and working women. Individual NLG members, in cases brough throughout the nation, represent litigants seeking to prevent cutbacks in funded abortions or attempting to end sterilization abuse.

The constitutionally recognized right of women to choose to have an abortion is central to women. Indeed, compulsion in the context of pregnancy represents an appropriation of a woman's body and definition of self so invasive as to go to the very core of her being. The right to abortion is the *sine qua non* of a woman's ability to control her personal destiny. Without it, women cannot gain access to or participate effectively in the political and social processes which shape every aspect of their lives. The degree of control women are able to exercise over their reproductive lives directly affects their educational and job opportunities, income level, physical and emotional well being, as well as the economic and social conditions the children They do bear will experience.

The United States Supreme Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973) that the right to choose when and whether to bear a child is encompassed within a woman's constitutional right to privacy. Addressing the effect of denying altogether the choice of abortion, Justice Blackmun wrote for the majority in *Roe*:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and

> physical health may be taxed by child care. There is also the distress for all concerned associated with the child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe v. Wade, 410 U.S. 113, 153 (1973).

The proposed legislation knowingly places these explicitly recognized burdens on women seeking abortions, thus depriving such women of effective control of many aspects of their lives.

I. MEDICAL RAMIFICATIONS OF RESTRICTED ACCESS TO ABORTION

1. Lack of Adequate Birth Control

Preferably abortion is an option only when birth control fails. No single method of birth control is 100% effective. Moreover, the most effective methods of birth control are also the most hazardous to women's health. The safest and most effective way for a woman to control her fertility is a barrier method of birth control backed-up by first trimester abortion in case of failure.

In fact, abortion is far safer for a woman than is full term pregnancy. During the period 1972-72, while the mortality rate for legal abortions in the U.S. was 3.3 per 100,000, the mortality for live births was 14.9 per 100,000. More than twenty-five times as many women died at term births than from induced legal abortions performed at 8 or fewer weeks gestation.[1/] The proposed legislation would not only criminalize abortion but also make illegal the extremely effective intrauterine devices and low estrogen birth control pills, both of which act to prevent implantation of the fertilized egg in the uterus.

2. Lack of Access to Abortion Results in Sterilization Abuse

Women currently resort to sterilization, permanent termination of the capacity to bear children, for many of the same reasons that they choose abortion. The difference, however, is that while abortion involves a decision not to have a child at a given time, sterilization involves a decision never to bear children. If abortion is criminalized it is most likely that many women who would otherwise rely on abortion should contraception fail will turn to sterilization rather than risk an unwanted pregnancy even though they are not certain that they permanently want to end their reproductive capacity. Thus, restricted access to abortion creates an environment where

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[1/] Cates and Tietze, Standardized Mortality Rates Associated With Legal Abortion: United States, 1972-75, 10 Family Planning Perspectives 109, 111, 112 (1978).

women wishing to control their reproductive capacities are encouraged to seek sterilizations due to the very limited range of other available options. This is a form of sterilization abuse.

(a) History of Sterilization Abuse

Sterilization abuse is the involuntary termination of reproductive capacity. It occurs when a woman is sterilized as a result of economic coercion; when a woman is sterilized without understanding the irreversible nature of the operation; when a women is sterilized for lack of viable alternative from which to choose, as would be the effect of the proposed legislation. If a woman seeks sterilization not because she wants to end her childbearing capacity but only because the less drastic choice of abortion in the even of contraception failure is not available to her, she is a victim of sterilization abuse. Sterilization abuse has taken and continues to take a variety of forms. This was explicitly recognized by the Department of Health Education and Welfare in promulgating regulations designed to protect people from this abuse. 2/

2/ The DHEW regulations were adopted by the Secretary on November 8, 1978 and became effective 90 days after adoption. The regulations apply to all government funded sterilizations. Most importantly, the regulations provide that: "(e) Informed consent may not be obtained while the individual to be sterilized is (i) in labor or childbirth; (ii) seeking to obtain an abortion." 42 CFR 50.204 (1978). This is a clear acknowledgement of the particular pressures upon women seeking abortions and the interrelationship between the abortion decision and sterilization abuse.

Women's consent to sterilization has been coerced under threat of withholding essential government benefits or medical treatment or as the price for obtaining an abortion. Women have been incorrectly told that their sterilization were reversible. "Consent" to sterilization has been extracted from women while they were hospitalized for childbirth, or abortion. These extremely stressful situations are hardly conducive to thoughtful reflection on a profound life choice. Women have also been sterilized without understanding the consequences of the surgery when there has not been an explanation in their primary language.

Sterilization abuse historically has had a disproportionate impact on both poor and minority women. Indigent women have always been particularly vulnerable to coercion in making the sterilization decision. With the withdrawal of medicaid funds for abortions, the economic coercion exerted on the poor took on a new and more drastic character. If, in addition, abortion is made illegal, any woman who at any time knows she cannot support an additional child, either economically or emotionally will be faced with a Hobson's choice: accept irreversible sterilization; seek unsafe or costly abortions; or remain exposed to the risk of unwanted and injurious pregnancies until the onset of menopause.

(b) Factors Contributing to a Rise in the Rate of Female Sterilization

Incidence of sterilization has increased three-fold since 1970. There are approximately twelve million sterilized persons in the United States and the number goes up by about 1.5 million annually. Today 60-70% of sterilization procedures are performed on women, a dramatic reversal of earlier trends. In 1972 80% of sterilizations in this country were vasectomies performed on males.

Three major events in 1969-70 led to more women seeking sterilization. The first was the abandonment by the American College of Obstetricians and Gynecologists of the "rule of 120". (Doctors previously refused to perform sterilizations unless the federal government's decision to reimburse state governments at 90% of the cost of Medicaid sterilization (as opposed to 50% for other medical services) even before Medicaid abortions were available. The last event was the publication of studies exposing the risks involved in taking oral contraceptives.

More recently, although the Hyde Amendment has virtually cut off federal medicaid funds for abortion, sterilizations continues to be funded at 90%.

Although comprehensive figures are not available on the incidence of sterilization since the passage of the Hyde Amendment, data now being collected indicates that a number of states curtailed abortion funding and at the same time in-

increased expenditures for sterilization.[3] Even in states where medicaid funds for abortion are still available, vastly more is spent on sterilization.[4]

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[3] States with a higher than average Medicaid sterilization rate where sterilization spending increased in 1978 while Medicaid funding for abortion was curtailed:

	1977	# of Medicaid Abortions Performed	1978
Alabama	1000		9
Arkansas	677		0
Idaho	100		21
Indiana	0		4
Nebraska	500		0
New Hampshire	200		1
West Virginia		low in both years	
Wyoming	100		0

Interview with Joy Drefoos, Fellow, Alan Guttmacher Institute, in New York City (March 11, 1980).

[4] Table 26. Title XIX Expenditures for Abortion and Sterilization Reported to DHHS. by State, 1978 (in thousands)

State	Expenditures for Abortion	Expenditures for Sterilization
Alabama	6	358
Alaska	16	25
Arizona ++	0	0
Arkansas	3	891
California	0	2,374
Colorado	29	64
Connecticut	44	158
Delaware	0	107
D.C.	0	236
Florida	5	+
Gerogia	3	449
Hawaii	0	300
Idaho	4	150
Illinois	83	871
Indiana	3	447

(Fn. Cont'd.)

Health insurance coverage similarly tends to reimburse for sterilization but not for abortions. Employers, for instance, are specifically exempted by the Pregnancy Disability Act from having to provide abortion coverage. There are thus already economic incentives for both poor and working

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4/ (Fn. Cont'd.)

Iowa	1	406
Kansas	2	199
Kentucky	0	910
Louisiana	0	78
Maine	2	28
Maryland	31	1,183
Massachusetts*	1	215
Michigan	0	1,601
Minnesota	0	948
Mississippi	1	422
Missouri	3	402
Montana	0	164
Nebraska	0	215
Nevada*	0	8
New Hampshire	≠	2
New Jersey*	38	240
New Mexico*	1	3
New York	40	+
North Carolina	5	382
North Dakota*	≠	32
Ohio	371	2,595
Oklahoma	14	538
Oregon	3	199
Pennsylvania	11	348
Rhode Island	1	295

(Fn. Cont'd.)

women to choose sterilization over abortion. Obviously, if abortion were criminalized, these incentives would be significantly stronger. The rapid rise in women's participation in the workforce, especially among married women with children is another factor currently influencing women to seek sterilization. Absent access to safe and legal abortion, many other women who would prefer to defer further childbearing in order to contribute to their family's income, may find themselves forced to choose between permanently giving up the chance to

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4/ (Fn. Cont'd.)

South Carolina	6	682
South Dakota	≠	114
Tennessee	4	590
Texas	8	2,025
Utah	1	98
Vermont	2	181
Virginia	3	211
Washington	*	100
West Virginia	10	310
Wyoming	≠	44

*Reported expenditures on abortion are for the period February 14, 1978 to December 31, 1978. Partial data with missing counties for New York. No data available for Washington. Reported expenditures on sterilization are for the 12 month period. CY 1978, except in the following states:

11 month data	10 month data	9 month data	7 month data	3 month	2 month
Colorado	Louisiana	Massachusetts	North Dakota	New Jersey	Maine
Illinois		Nevada			
Kansas		New Mexico			
Ohio					

+ Not available
++ Arizona's Medicaid program was not operational in 1978.
≠ Less than 300 patients.

Source: Health Care Financing Review, Tables 9 and 10. Fall, 1979. From Alan Guttmacher Institute bear children and facing an unwanted pregnancy if their contraception fails.

(1) Poverty as the Single Most Important Factor in Increase in Female Sterilization

The pressure to seek sterilization will continue to be greatest on those least able to afford either more children or expensive illegal abortions. As the chart below indicates[5] sterilization rates in the U.S. in 1976 were nearly twice as high for the poor of all races as for other women in the age

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[5] Table 1. Percent surgical sterilization among married couples by age, sex and income group, 1976.

	All (15-44 years old)		25-34 years old	
	Low Income	Mid Income	Low Income	Mid Income
Female	21.7	16.7	26.5	14.7
Male	4.6	12.0	8.4	11.0
Total	26.3	28.7	34.9	25.7

	35-44 Years	
	Low Income	Mid Income
Female	34.0	28.3
Male	3.3	20.2
Total	37.3	48.5

Source: Kathleen Ford, "Contraceptive Use in the United States, 1973-1976," Family Planning Perspectives 10 (September - October 1978) Tables 1-3.

group 25-34 whereas sterilization increases among higher income couples occur among those 35 or older. Also, male sterilization makes up a substantially higher percentage of the total sterilization rate among middle class couples than among lower income couples.

(2) Race As A Significant Factor In Female Sterilization

Before public funding for abortions was available, black women were sterilized twice as often as white women. A 1970 study shows that approximately 16% of all black married women of child bearing age were sterilized as compared to the 7% of all married white women in that same category. It should be noted, however, that in the period when publically funded abortions were available, the disparity in sterilization between black and white women evened out.[6/]

Although comparable national data is not available for Hispanics in the U.S., a study of New York City voluntary and municipal hospitals made in 1973 concluded that the percentage of Spahish-speaking women sterilized was almost three times the rate of Black women and six times white women.[7/]

6/ 11 Family Planning Perspectives 253 (1979).

7/ C.A. Westoff and C.F. Westoff, Fertility, Contraception, and Abortion in America 22 (1971).

A 1972 study revealed that non-white women were sterilized in much larger numbers than their representation in the population of all family planning patients and in greater percentages than white women.[8] The same study revealed a similar disparity between women receiving public assistance and non-recipients.

Black women under 21 years of age have been reported to be sterilized with greater frequency than white women of the same age.[9]

The evidence thus demonstrates that the criminalization of abortion would not only increase the incidence of already familiar forms of sterilization abuse, it would create a new and larger class of victims.

8/

	Percentage of Total Sterilization Patients	Percentage of Total Family Planning Patients
Whites	40	53
Hispanics	17	11
Blacks	43	37

Vaughan and Sparer, op. cit. at 225

9/ Hellman, Louise M.D., The Sterilization of Minors and Others Legally Incapable of Consenting: A Review of Current Information, Public Health Center (December 28, 1973)

II. SOCIAL RAMIFICATIONS OF RESTRICTED ACCESS TO ABORTION

1. Impact of Restricted Access to Abortion on Women's Employment and Educational Opportunities

The unavailability of abortion as an option for women would make illusory a woman's right to equal employment and educational opportunities. The national commitment to equal employment opportunities unfortunately has done little to narrow the labor market gap between women and men. Although the prohibition against sex discrimination in employment has enabled some women to compete for and secure higher-paying traditionally male-assigned jobs previously closed to women, substantial sex-related job segregation persists, and women continue to be concentrated in low-level, low-paying jobs.[10]

Compounding the initial difficulty women face upon entering the job market or earning a fair wage, are difficulties in securing any type of childcare for the working hours. The working mother's frequent response is to "make do" with part-time or part-year work. The statistics compiled by the U.S. Labor Department indicate that approximately one-third of all employed mothers accomodate the dual demands of childrearing and family economic survival by engaging in part time jobs.[11] However, in exchange for the flexibility and time that part-time work offers, these mothers accept work which is dramatically underpaid in comparison with full time employment and sacrifice non-salary compensation including fringe benefits, tenure, or salary adjustments. They are, moreover, often relegated to occupations involving menial, routine and physically taxing work.

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[10] U.S. Commission on Civil Rights, Women Still in Poverty 19 (July 1979); Simmons, Freedman, Dunkle and Blair, "Exploitation From 9 to 5), Background Paper for the Twentieth Century Fund Task Force on Women and Employment Ch. 1 (1974), reprinted in B. Babcock, A. Freedman, E. Norton and S. Ross, eds, Sex Discrimination and the Law 192, 198 (1975).

A woman's inability to exercise full control over the size of her family may lead to child care responsibilities that make even part-time employment unrealistic. Thus, these women will be forced to leave the work force despite economic need. Their job development will be interrupted, and they will return only when their children reach school age. There is a permanent return to the labor force for some women and continued intermittent employment for others.[12] In addition to the significant dampening effect on wages, the interrupted

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11/ See Glazer, Majka, Acker and Bose, "The Homemaker, The Family, and Employment," in Joint Econ. Commission Subcommittee on Economic Growth and Stabilization, American Women Workers in a Full Employment Economy 155, 95th Cong., 1st Sess. (1977).

12/ See Organization for Economic Cooperation and Development, The Role of Women in the Economy 133 (1975).

work histories of these women have a number of adverse consequences: insufficient job tenure to ensure occupational stability, low job mobility opportunities, ineligibility for social security benefits, and reduced deposits into private pension plans.[13] In short, inequities in the job market are exacerbated and perpetuated by the burdens of childrearing overwhelmingly with such inequities falling upon women.

Like equal employment opportunity, equal educational opportunity is a professed goal of the Nation.[14] American society recognizes that equal access to education is fundamental because education largely determines the quality of our individual and collective lives. The realization of full and equal access to educational opportunities requires that women make reproductive choices free from governmental intrusion.

The obstacles to women's educational attainment posed by child rearing responsibilities are apparent. Women continue to lag behind men in overall educational attainment[15] and consequently in the benefits which it brings. The level of educational attainment largely determines the extent of labor force participation and occupational choice.[16] More women with little formal education tend to be unemployed[17] at rates greater than men with the same educational levels When they are working, they are concentrated in low-status, menial jobs.[18] The less education a women receives, the lower her income is likely to be.[19] During their child-bearing years, for example, school enrollment rates for women fall far behind those of men.[20]

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[13] See U.S. Department of Health, Education and Welfare, Social Security and the Changing Roles of Men and Women 10, 20-22 (February 1979).

[14] See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1978).

[15] For example, in 1976, majority women were still 35% less likely than majority males to have completed 4 or more years of college. U.S. Civil Rights Comm'n, Social Indicators to Equality for Minorities and Women 16 (1978).

The paucity of satisfactory child care options apparent in the employment context also have an effect on the educational opportunities available to women of all ages. Indeed, the impediments may be greater in the educational context, for unlike gainful employment, studying produces no immediate income. Educational institutions are under no obligation to provide day care facilities for the children

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16/ Generally, the more education a woman has, the greater the likelihood that she will be engaged in paid employment. Handbook on Women Workers at 187-88.

17/ Id at 191-92

18/ Id at 189-91

19/ Id at 194-5

20/ Starting at age 16 with school enrollment rates approximately equalling those of men, women's rates fall progressively further behind men's. By the time women reach the 22 to 24 year bracket, their enrollment rate is only slightly over half that of comparably aged men, a relation which remains steady through the 30-34 year bracket. Handbook on Women Workers at 197.

of women desiring to study, and welfare departments are allowed wide discretion to grant or deny recipients the child care allotments necessary to permit them to study.

The criminalization of abortion would therefore significantly impact the effectuation of women's civil and political rights, reducing the empty promises the guarantees of equal educational and employment opportunities.

2. Impact of Restricted Access to Abortion on Teen Age Women

The consequences for teenage women of an unwanted pregnancy are particularly harsh. According to testimony received by the McRae court, eight-tenths of the women who become mothers at 17 or younger drop out of school, and alternative educational programs for such young mothers are provided by only one-third of the states.[21] Pregnancy is the reason most often cited by female teenagers for dropping out of school.[22] As previously mentioned, the level of education has a direct bearing upon employment and therefore economic independence. Seventy two percent of the women who first gave birth at age 15-17 and 41% of those who gave birth at ages 18 or 19 were receiving public assistance.[23/] Pregnancy among teenagers is a major public health problem, with serious medical, and psychological implications for the mother and baby. Studies show that pregnant adolescents have higher rates for toxemia, prolonged labor, premature delivery, pelvic disproportion and cesesarean section than more mature women.[24/]

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[21] McRae v. Harris, slip op. at 147

[22] Allan Guttmacher Institute, 11 Million Teenagers 25 (1976).

In addition there are very serious emotional problems resulting to adolescents who carry an unwanted pregnancy to term.[25/]

Teenage women account for approximately one-third of all abortions each year. If these 300,000 young women per year were no longer able to choose to terminate their pregnancies these already alarming social and medical problems would be even further compounded.

3. Impact on Unmarried Women of Restricted Access to Abortion

It is beyond dispute that a social stigma extends to the mother of illegitimate children at least to the same

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[23/] Id. at 26.

[24/] Approaches to Adolescent Health Care In the 1970's, DHEW Publication No. (HSA) 75-5014, p.17

[25/] See McRae v. Harris, slip op. 143-7.

degree as to the children themselves. The Secretary of the United Nations summarized the impact of this stigma in a report on the status of the unmarried mother as follows:

> It has often been said that a person born out of wedlock, the parents of that person (the mother much more so than the father), and sometimes the entire family of the mother, suffer a stigma as the result of the nature of the birth. Words such as "discredit", "disdain", "shame", "contempt" and "condemnation" have been used to describe that stigma. When it exists, it impairs the social position, not only of the person born out of wedlock, but also the mother, thus constituting for her an obstacle to the realization of a normal life in the community in which she lives.26/

The proposed legislation would remove from a woman the right to decide whether or not she and her family are able and willing to bear this enormous social and psychological burden.

4. Impact of Restricted Access to Abortion on Women's Bodily Integrity

An unwanted pregnancy is a continuing invasion of a woman's body for a period of months. It requires sacrifice on the part of the woman in the form of physical discomfort and perhaps pain. A pregnant woman is frequently limited in the types of physical activity she can undertake, and may experience a number of side effects during pregnancy. Furthermore, a pregnancy can have permanent physical effects in cosmetic as well as health matters, and does, with greater

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26/ Secretary of the United Nations, Report: "The Status of the Unmarried Mother: Law and Practice" 56 (1971).

frequency than legal abortion, lead to the death of the woman.[27/]

III. LEGISLATIVE CONCERNS FOR "HUMAN LIFE"

The proposed legislation, which is framed in terms of "protecting human life" is in actuality an attempt to limit women's political, economic and civil rights. Ironically, current supporters of anti-abortion legislation do not view the protection of human life as a legitimate congressional concern when the life involved is that of an adult woman. Supporters of S.158 have been among the most vocal opponents to any legislation that would provide aid to victims of domestic violence as well as support for prevention services,[28/] citing the lack of jurisdiction to intervene in private family matters. In contrast, the effect of S.158 would be to impose a Congressional view of "human life" upon all individuals, thereby violating individual's right to religious freedom and significantly influencing the childbearing and birth control decisions of millions of Americans. The tremendous legislative concern for "fetal life" without regard to the physical, emotional, and economic consequences to the women forced to bear unwanted children can only be viewed as an elevation of the rights of the fertilized egg at the expense of the rights and lives of women.

27/ Cates and Tietze, Standardized Mortality Rates Associated With Legal Abortion: United States, 1972-75, 10 Family Planning Perspectives 109, 111, 112 (1978).

28/ See 126 Cong. Rec § 2051-12066 (dailyed. September 4, 1980).

Ms.
FOUNDATION
FOR WOMEN, INC.
370 Lexington Ave., New York, N.Y. 10017
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The Ms. Foundation for Women is a national women's fund, providing grants and technical assistance to women's projects seeking to enhance the status of women in society. Its board and contributors represent a broad range of women and men concerned with the health and economic well-being of women and their families. Its Reproductive Rights Project was created in response to the growing opposition to each woman's right to make her own choices about childbearing regardless of economic status, and provides national, state and local groups with assistance, training and funds for public education on the issue of abortion. Through our training and grant-making, the Ms. Foundation for Women works with a network of women's and health groups with a commitment to the right to choose.

The Ms. Foundation for Women strongly opposes S. 158, the Human Life Statute as a measure which will impose inhuman hardship on all women and their loved ones should it be passed. Our own history has proven that making abortion illegal simply makes it unsafe and in no way prevents women or couples from determining to terminate a pregnancy for their own physical or mental health. Children deserve a decent quality of life. This quality of life is becoming increasingly difficult for families to obtain. Compulsory pregnancy would destroy the personal freedom of all women and the life, health, and well-being of thousands of American women and their families.

national abortion federation

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PRESS RELEASE

The National Abortion Federation, representing the professional community through its 200 member clinics throughout the United States and the 1.5 million women who choose to terminate their unwanted pregnancy each year, denounces the so-called human life bill, not only as an untenable intrusion into responsible medical practice, but as a threat to human life — existing life.

The proposed legislation jeopardizes the foundation of the medical profession and will have far reaching implications for the entire medical community. Practioneers will be reluctant to provide for their patients necessary medical care for fear of criminal prosecution. Constant government surveillance over the medical profession will destroy its traditional autonomy, privacy rights of physicians and the privileged doctor/patient relationship.

"No law will stop abortions. Women always have and always will terminate unwanted pregnancies", said Uta Landy, Ph.D., Executive Director of the National Abortion Federation. "This organization is dedicated to making abortions available to women safely and legally."

The National Abortion Federation is conducting an all-out effort to educate the millions of women and men coming to its clinics about the threat to safe, legal abortion. More than 8 million women have had legal abortions in this country. These women, their partners and friends represent a powerful constituency which will not stand by quitely while Congress attempts to interfere with the most personal and private decision of whether and when to have a child.

STATEMENT OF KAREN MULHAUSER

National Abortion Rights Action League

The National Abortion Rights Action League (NARAL) was founded in 1969 to lead the struggle for repeal of restrictive state abortion laws. Since the 1973 Supreme Court decisions which ruled that abortion is part of the constitutional right of privacy, NARAL has worked to keep abortion legal, safe, and accessible regardless of socio-economic level.

The National Abortion Rights Action League has a rapidly growing membership which currently totals over 125,000 dues-paying individuals. NARAL also has affiliates in nearly every state with their own memberships. NARAL is dedicated to the elimination of laws and practices that would compel women and their families to carry all pregnancies to term.

In working to maintain free choice with regard to abortion, NARAL represents the majority in this nation, for numerous public opinion polls indicate that most Americans are pro-choice. The most recent poll shows that the vast majority of Americans reject legislation to prohibit abortion. Forty percent believe that a woman has an unconditional right to end any pregnancy she chooses; and 74%, nearly three-quarters, believe that women have the right to end pregnancies under most circumstances (Washington Post/ABC News poll results of May 18-20, 1981). The framers of S. 158 and its counterparts in the House of Representatives represent the mere ten percent of Americans who believe that women should carry all pregnancies to term.

For years the pro-choice American majority remained too silent, confident that its elected representatives would naturally heed the will and common sense of the majority and not threaten legal abortion.

However, the public's complacence has ended. People throughout this country -- in every state and in every congressional district -- are awakening to the fact that the United States Congress is seriously considering legislation to prohibit legal abortion; and the majority is silent no longer. Every congressional office is hearing from an increasing number of pro-choice constituents and every interest group which is working to keep abortion legal is finding new troops and allies.

Unlike the elected representatives who support S. 158, most Americans recognize that making abortion illegal will not stop women from having abortions, but it will compel over a million women each year to seek unsafe, illegal abortions. Most Americans want women and children who are victims of rape or incest or who face medical risks if they carry a pregnancy to term to be allowed to decide whether or not to terminate their pregnancies. Most Americans sympathize with a family which learns that a fetus the woman is carrying is seriously deformed; and most Americans believe the family should be able to choose whether or not to have an abortion. Most Americans do not want 14 and 15 year old girls starting families for which they are neither emotionally nor physically able to care. And now many members of this pro-choice American majority are starting to ask themselves why their elected representatives are spending taxpayers' money to advocate legislation which the vast majority of their constituents oppose. Pro-choice Americans will increasingly demand that their elected leaders truly represent them by opposing legislation which would make abortion illegal.

Congressional approval of S. 158 becomes even more unacceptable to the American public as it learns about the ramifications of giving legal personhood status to a fertilized egg and fetus -- a far-reaching change in our laws which is unprecedented. Noteworthy and thoughtful testimony has been given about the possible impact of S. 158 with regard to criminal laws against abortion, medical care of pregnant women, religious liberty of all Americans, and so on. But even though S. 158 has potential massive impact on people's lives in this country, proponents of this bill have been strangely unwilling to discuss the very real implications of their legislation, indicating that we can all watch the ramifications unfold after S. 158 becomes law. This irresponsible approach to a bill which could greatly effect nearly every American's personal life is unworthy of the United States Congress and will not be accepted by the voting public.

Any legislation or constitutional amendment which compels women to carry all pregnancies to term forces them to repeatedly risk their lives and health for a fetus. In 1978, the latest year for which there are completed DHHS statistics, 61 percent, or almost two-thirds, of women who went through childbirth under medical supervision had health complications, and the number is rising, not falling. Women also die from complications of pregnancy and from childbirth, especially outside of hospitals. (In fact, mortality from childbirth is 11 times that of legal abortion.) Nothing in S. 158 guarantees to a woman who becomes pregnant that there will be medical facilities present when she delivers.

No other law in this country, except for the draft, requires individuals to sacrifice life and limb for others. No law can compel an individual to donate a kidney to save a family member; no law mandates that people must place themselves in jeopardy by attempting to rescue others from flood or fire; yet this proposed law -- S. 158 -- would require every woman of reproductive age to risk her life and health if she becomes pregnant, requiring her to place her own life in jeopardy for a fetus. There is no precedent for such government-mandated self sacrifice in this republic.

When you consider the potential dangers faced by every pregnant woman, it becomes obvious that the "pro-choice" movement is really the "pro-life" movement in this country because it is working to protect the fundamental right to life, health, and liberty of half the American population. And the so-called "pro-life" movement, then, is really "pro-state-control;" It is a sham. Under the guise of protecting the biological existence of an unborn and undeveloped fetus, it would expand the reach of the state to the point that it is coercing women, by law, to carry pregnancies to term and risk their lives for a potential life. No administration or Congress devoted to reducing government control over our lives could conceivably support the so-called "pro-life" movement's goals.

NARAL calls upon the members of this Subcommittee to join with the vast majority of their fellow citizens in opposition to S. 158.

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National Alliance for Optional Parenthood is a non-profit, tax-exempt organization.

June 1981

OPPOSITION TO S.158, THE "FETAL PERSONHOOD BILL"

The National Alliance for Optional Parenthood (NAOP) opposes S.158 on constitutional and moral grounds. NAOP deplores attempts to subvert the Constitution of the United States through amendment by legislation and objects strongly to efforts by one group of citizens to impose their philosophy forceably on the entire nation.

Specifically, the National Alliance for Optional Parenthood opposes S.158 because it would deny women access to legal abortion. This position is supported by the following policy adopted by the NAOP Board of Directors on 17 September 1976:

> The National Alliance for Optional Parenthood, in accordance with its goals, supports the right of individuals to maintain a childfree lifestyle. To accomplish this in a manner consistent with the individual conscience, all methods of controlling one's fertility, including contraception, sterilization and abortion should be readily obtainable, legally available and a matter of personal choice.

The National Alliance for Optional Parenthood is a nonprofit educational organization founded in 1972. The primary purpose of NAOP is:

- To promote informed, thoughtful and unpressured decisions about whether to be a parent or to be childfree;
- To make the "childfree choice" a socially accepted and respected option.

S.158 would have a negative effect both on NAOP members who have decided not to be parents and those who are in the process of deciding about parenthood. By eliminating abortion and certain forms of contraception, S.158 decreases the methods available to people to carry out their reproductive decisions.

Parenthood is too important and demanding a role to be left to chance. Reproductive options must be preserved in order to prevent the problems associated with unwanted births and to promote a high quality life for all citizens.

NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN
1360 Avenue of the Americas
New York, New York 10020
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June 16, 1981

STATEMENT BEFORE THE SENATE JUDICIARY SUB-COMMITTEE ON SEPARATION OF POWERS

Senator John P. East, Chair
Senator Max Baucus, Ranking Minority

The National Association of Commissions for Women strongly urges the Sub-Committee on the Separation of Powers against support of S. 158/H.R. 900 - the so-called Human Life Statute.

This legislation would prohibit the individual States from funding abortions, even where State Legislatures had determined such funding to be the will of its people. In effect, the legislation sets a national policy that has as its consequence the removal of States' will to act in this area. This is not States' rights, towards which the President has been working, but the opposite. We urge the Sub-Committee on the Separation of Powers to refrain from infringing upon the individual wills os our 50 States, to further the moral and religious beliefs of one segment of our society against the views of other moral and religious people in a pluralistic and free society.

The National Association of Commissions for Women is the national unifying body of official State and local commissions created by our 50 States to improve the lives of women. Today this network includes 140 commissions across the country.

On behalf of our national constituency, we ask for negative action or S. 158/H.R. 900.

Mary Burke Nicholas

NACOPRW

National Conference of Puerto Rican Women, Inc.

131 State Street, Suite 312, Boston, Mass. 02109

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OVERVIEW OF NACOPRW

The National Conference of Puerto Rican Women (NACOPRW) is a non-profit, non-partisan organization which seeks to attain the equal participation of Puerto Rican and other Hispanic women in the social, economic and political life of the United States.

The organization has chapters in - Hartford, Connecticut; Miami, Florida; Cleveland, Ohio; Chicago, Illinois; Philadelphia, Pennsylvania; Washington, D.C.; New York City, New York; and Boston, Massachusetts - formulated in Silver Springs, Maryland and San Juan, Puerto Rico in April 1980.

NACOPRW grew out of the increased awareness brought about by the women's movement. Individual Puerto Rican women began to assess their situation and to raise questions about themselves as members of the Puerto Rican ethnic minority in the United States, and as women within that oppressed community. The need for an organization that would address itself to that dual discrimination led to the incorporation in February 1972 in Washington, D.C. of the National Conference of Puerto Rican Women.

Our intense involvement with the social, economic and cultural conditions of all Puerto Ricans initially prevented us from confronting the issue of the status of women who accounted for over half of that community. However, analysis of poverty statistics for the Puerto Rican population revealed that Puerto Rican women have a compelling reason to seek work outside the home. Job finding is extremely difficult and when found, is in low-paying occupations with little promise of promotion. As women, we also have the right to work in order to fulfill our individual needs and aspirations.

For these reasons, we focus our conferences, workshops and other activities on issues of general concern to the Puerto Rican and Hispanic community, education on women's rights and employment rights, and outreach toward other organizations.

nea
NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D C 20036 • (202) 833-4000
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STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION ON REPRODUCTIVE FREEDOM

The National Education Association supports the right of reproductive freedom for all women. NEA supports the 1973 U.S. Supreme Court decision that guarantees the constitutional right to personal privacy and reproductive freedom for women.

NEA is an independent organization open to all educational personnel with a current membership of over 1.7 million members and affiliates in every state. NEA's membership includes women representing a cross-section of American society. NEA's membership has affirmed in its resolutions its dedication to the elimination of all aspects of discriminatory practices against women.

Although reproductive freedom is part of a constitutionally protected right to privacy, a right that cannot be exercised is no right at all. NEA opposes government action which restricts the right of women and their families to make very personal decisions privately.

Reproductive freedom does not frame a moral debate as to what decision individuals should make and does not call for a moral judgment for or against abortion. We must remain steadfast in our defense of the right of reproductive freedom for women. That is the right and compassionate thing to do.

NEA/GR;6/17/81

National Family Planning and
Reproductive Health Association, Inc.

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STATEMENT OF THE
NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION
REGARDING S. 158
SUBMITTED TO THE
SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JUNE 1981

The National Family Planning and Reproductive Health Association (NFPRHA) is a non-profit membership organization headquartered in Washington, D.C. devoted to the improvement and expansion of the delivery of family planning and reproductive health care services throughout the United States. It is the largest organization in the nation composed of providers and consumers of family planning and reproductive health care services. Our members are committed to establishing and maintaining reproductive health care as a high priority preventive health care service in this country.

NFPRHA believes that comprehensive reproductive health services, education and counseling, including abortion, should be available to all individuals regardless of their economic status. We believe that it is of primary importance that the needs and rights

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of all persons seeking family planning and reproductive health care services, education and counseling be met with sensitivity and concern for their physical and mental well-being. Finally, we believe that reproductive freedom is one of the most fundamental human and civil rights.

NFPRHA recognizes its responsibility to uphold this right, basic to all, and must actively oppose any erosion of reproductive freedom and any restriction of access to comprehensive family planning and reproductive health care services.

Therefore, the National Family Planning and Reproductive Health Association, along with a sizeable majority of Americans, strongly opposes the consideration and passage by the Congress of the United States of S. 158 and all other proposals to define the point at which "human life" begins. Such a definition is impossible to legislate, since there is no consensus among religious leaders, scientists, philosophers, ethicists, medical professionals, politicians or any other segment of our society as to when "human life" begins.

Such proposals would, if enacted, severely restrict reproductive freedom in this country. Abortion would, or could, become a federal or state crime, in contradiction to the fundamental right proclaimed by the Supreme Court in its 1973 rulings in Roe v. Wade and Doe v. Bolton. Various contraceptive and prenatal practices and methods could also be outlawed. In addition, such proposals present a host of other not-completely-understood, but potentially far-reaching, ramifications in the areas of medicine, law, economics and ethics.

Thus, the National Family Planning and Reproductive Health Association, representing those who are most directly involved with the provision and receipt of family planning and reproductive health care services -- those who are most likely to be affected by the passage of a "human life amendment" or "human life statute" -- urges the United States Congress and this Subcommittee to reject all proposals that would seek to limit reproductive freedom, as S. 158 would do.

National Federation of Temple Sisterhoods
838 Fifth Avenue, New York, New York 10021

Statement by Lillian Maltzer, Huntington Woods, Michigan
President, National Federation of Temple Sisterhoods

The National Federation of Temple Sisterhoods is the women's agency of Reform Judaism. Ou Federation includes over 600 affiliated Sisterhoods throughout the United States with more than 100,000 members. Our agency has as its primary concerns strengthening the synagogue, concern for the Jewish family, the education and well-being of our children, meeting the needs and interests of our members through continuing Jewish education, concern for the quality of communal life, interfaith activities and as an expression of our religious mandate for full participation in our society, a special concern for meeting the needs of the elderly, children and the disadvantaged.

I speak on the right of choice from several points of view:

As the President of a large body of religiously affiliated women;

As a mother, having borne children, two of whom are women;

As a nurse who has seen much suffering in the past, and who had hoped that women had achieved some measure of control over their lives and bodies.

The Supreme Court has held that the question of when life begins is a matter of religious belief, and not medical or legal fact. While we recognize the right of religious groups whose beliefs differ from ours to follow the dictates of their faith in this matter, we vigorously oppose attempts to legislate the particular faith of those groups into the law which governs us all.

Jewish law holds that the fetus is not a living being until the moment of birth. Indeed, there is much biblical basis for this tradition, and even more basis for the clear understanding that if the fetus threatens the life of the mother, the mother's life takes precedence.

As President of the National Federation of Temple Sisterhoods, which includes more than 100,000 women, I tell you that we believe that the right to choose on the matter of abortion is a personal decision based on religious, moral and cultural values and beliefs; it should not be determined for others by special interest groups whether religious or otherwise, not should government be the enforcing agency for their points of view.

We also strongly support the right of people of other faiths to act according to their conscience in this matter, without government interference; thus we would strongly oppose any law which would make abortion mandatory under any conditions. Such interference with conscience is as abhorrent to us as are the proposed Human Life Amendments which are currently in the Congress. We believe that our freedom is grounded in the American tradition of the separation of Church and State, and that theology should not be legislated into law.

As the mother of young women in their child-bearing years, I feel threatened by the Huma Life Amendment, knowing that its implications are destructive to our personal privacy, o inheritance laws, to our criminal system—there is no end. "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency." Such simple words! Yet, think of what this would mean. Should my daughter conceive, and then have a spontaneous miscarriage (which happens to more than one-fourth of all conceptions), would this then have to be investigate by the coroner to be sure that murder was not committed?

If my daughter wishes to use birth control, has she lost the right to choose an IUD, wh prevents the fertilized ovum from being implanted in the uterus?

Should my daughter, if she becomes pregnant, spend her entire pregnancy in bed to avoid even the possibility of aborting? If not, has she committed a capital crime?

Ultimately, will every woman become not only the prisoner of her fetus, but also the prisoner of her gender, reporting the most intimate details of her life to those who are trampling on her religious and personal rights?

Surely our government, which is said to have a mandate to "get off the backs of the people" must not fall into the trap of more regulation of our personal lives.

As a nurse, I am convinced that to deny women the right to legal abortions will not reduce the number of pregnancy interruptions--it will only drive women back to the alley operators with the same horrible consequences which I well remember seeing in the hospital--the exsanguinated, toxic women who sought desperately for some way out of their dilemmas--young girls who needed surgery which then prevented them from ever bearing children, mothers of large families who could not face having another child and then died from an illegal abortion leaving the children motherless, others who left the hospital scarred in other ways by the infections they contracted.

Today this would happen mostly to the poor who could not afford to go where proper care was available. Yet, the same people who deny the poor the right to control their reproductive life, also would deny them contraceptive education, almost ensuring continued human misery.

We cannot underestimate our opponents and we must tell them and speak out to all on what we believe:

WE - not they - are pro-life.	We are anti-hunger, anti-unwanted children, anti-abused and neglected babies.
WE - not they - are pro-family.	We are anti-human misery from whatever is destructive to the family--unlimited numbers of children, genetic malformations or incestuous conceptions.
WE - not they - are pro-freedom	of religious conscience, in the spirit of the Bill of Rights of our Constitution.

And We Will Not Abandon These Principles!

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The National Women's Health Network is the only national membership organization of consumers and providers devoted exclusively to women's health. Our constituency -- nearly 10,000 members nationally -- is broad-based and represents great diversity demographically. The Network has a variety of programs and services, including a bimonthly newsletter and other publications, annual educational conferences, and a Women's Health Clearinghouse. We are often invited to present testimony or provide technical assistance on women's health issues at the local, state, and federal level. The Network has representation in each of the 50 states, although it does not have state chapters or affiliates per se.

The National Women's Health Network opposes S.158. Abortion is a critical public health issue facing all women. Without legalized abortion, an estimated 1 million illegal abortions occur annually, often with complications and death. Young, black, and poor women are particularly at risk. We believe that it is every woman's right to choose whether and when and under what circumstances to bear children. There are circumstances under which abortion is justified, and in a pluralistic society there cannot be attempts to legislate morality.

S.158 has potentially sweeping consequences, legally, economically, and psychologically for all women. It condemns women to unsafe medical care, and in many instances, to economic disaster. The right to abortion must be recognized as inextricably connected to a number of other critical issues. Freedom of choice, guaranteed by the Constitution of the United States, must be upheld as a fundamental right.

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Position Paper On Abortion

Adopted By

The National Women's Health Network Board

On June 4, 1978

The National Women's Health Network regards access to safe, legal abortions as a basic right of all women irrespective of age or marital or economic status. It is every woman's right to choose whether and when and under what circumstances to bear children. This choice will only be truly available to all women when a number of critical social constraints have been removed and there exists universal access to contraceptive information and counselling, particularly for very young women, assured pregnancy disability rights for working women, universal access to decent infant health care, and high quality day care at low cost.

Safe legal abortions must be readily available and financially accessible to all women. The Network is irrevocably opposed to the elimination of public funds to finance abortions for low income women, as an erosion of equal rights under the law, an insupportable limitation of the choice of women to whom society gives fewest options, and an example of legislated class discrimination which endangers the lives and health of the women whom it affects. The Network also opposes the elimination of federal funding for federal workers, as well as federal and state restrictions for other groups of women workers. Lack of financial access to abortion services force many women to accept sterilization as a form of birth control, losing their childbearing capacity forever because they fear pregnancy in adverse circumstances.

Clearly then, the right to abortion is inextricably intertwined with a number of other issues, whose ultimate resolution may make abortion a crucial but less frequently exercised right. The NWHN supports struggles around these issues, particularly the fight against sterilization abuse, and the movements for child care services and pregnancy disability rights. It is in favor of coalitions which link these issues conceptually and in practice.

Abortion services are only one part of a woman's need for complete health and medical care. The financing of comprehensive health care services for women must include coverage for all reproductive services, including abortion. True comprehensive care, which will include universal access to a broad range of high quality services, will only come about through the advent of a community-based, democratically-controlled national health system.

The NWHN sees the importance of supporting legislative and legal work on abortion rights, and supports the single issue organizations which are leading that struggle at the federal and state levels. However, it opposes the use of arguments and policies on the abortion issue which stem from an analysis which suggests that population control is an element in the movement for reproductive rights. Population control groups have tried to counter the attempt to prevent sterilization abuse through regulations, and have suggested that states should fund abortions as a way of keeping welfare costs down. The NWHN does not support the population control analysis. It takes its stand on the inalienable right of each woman to control her body and her life.

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STATEMENT OF IRIS MITGANG, NATIONAL CHAIR
NATIONAL WOMEN'S POLITICAL CAUCUS
on S.158, the "Human Life Bill"

June 18, 1981

On behalf of the National Women's Political Caucus, a nationwide, multi-partisan organization with over 55,000 members in 300 state and local Caucuses across the country, I submit this statement on S.158, the proposed "Human Life Bill," to the Senate Judiciary Subcommittee on the Separation of Powers for the hearing record. The National Women's Political Caucus is dedicated to the education and full participation of women in all phases of the political process. Reproductive rights has been a central and priority concern of our organization since its founding 10 years ago.

The National Women's Political Caucus opposes enactment of S.158 and all other attempts to deny or restrict a woman's reproductive rights. We believe that a women's right to control her own body, in line with sound medical advice and in accordance with her own moral or religious sensibilities, is fundamental. By reproductive rights we mean freedom from sexual violence such as rape and incest, freedom from sterilization abuse, accessible and affordable family planning information and services, the right to a workplace free from reproductive hazards, along with the right to choose to terminate a pregnancy. Reproductive rights are central to, and interwoven with, all of our efforts to achieve economic equity for women and equal rights under law.

LEGAL RAMIFICATIONS OF S.158

The "Human Life Bill" is clearly an attempt to subvert via statute the 1973 Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973), that declared that the constitutional right to privacy encompassed a woman's right to terminate a pregnancy. The bill would legislate that human life, and therefore "personhood" under the 14th Amendment, begins at conception. Many of the arguments against the bill have been raised throughout the Subcommittee's hearings, but the seriousness of the ramifications merit a repetition of the major points. Enactment of S. 158 would:

1) allow states to outlaw all abortions, even those in cases where the woman was a victim of rape or incest, and where continuation of the pregnancy threatened the woman's health or very life.
2) allow states to enact criminal penalties for women who have or seek abortions, doctors who perform or advise abortions according to their best medical judgement, or spouses or friends that assist a woman in exercising her constitutional rights.
3) open the door to a ban on several of the most effective forms of birth control, including the IUD, some or all birth control pills, and the "morning-after" pill -- the only after-the-fact contraceptive.
4) inflict other health hazards on women, forcing them to carry harmful pregnancies to term, possibly causing women to avoid needed medical care out of fear. For instance, a woman who miscarries may not see her doctor fearing prosecution or investigation.
5) establish one religious or moral view on all Americans and abridge the separation of church and state.
6) constitute a totally unacceptable form of government intrusion into the private lives of citizens by making pregnancy mandatory and possibly devising an enforcement scheme.
7) force major changes in many legal areas, including tort law, tax law, and property law by defining legal personhood as beginning at conception.

Section 2 of S. 158 would deny jurisdiction in abortion-related cases to the lower federal courts. This, too, raises serious constitutional questions. Proponents of this jurisdiction limitation make no attempt to conceal that this is an attempt to undermine the rights articulated in Roe v. Wade by restricting citizen's access to judicial redress.

The federal court system has the ultimate power to interpret the Constitution -- dating back to Marbury v. Madison, 1 Cranch 137, in 1803. While the Constitution does entrust Congress with the authority to create lower federal courts, Congress may not restrict court jurisdiction for the purpose of impeding enforcement of constitutional interpretations. And Congress does not have the authority to allow states to act in a way that would be otherwise disallowed under the 14th Amendment. To enact this court jurisdiction limitation would constitute a reallocation of power among the three brances of our government and would seriously threaten the system of checks and balances. To allow state courts to interpret constitutional rights could result in 50 differing versions of those rights -- clearly not what the framers of the Constitution had intended.

Limiting court jurisdiction also raises equal protection questions by singling out pregnant women for deprivation of access to the courts.

In sum, S.158 is an attempt to amend the U.S. Constitution through the back door. To overrule a decision by the Supreme Court on constitutional rights by a majority vote is beyond the power and authority of Congress. There is only one way to reverse the 1973 ruling, and that is by amending the Constitution itself. It was precisely for the purpose of protecting the American people from congressional whim and excess that the framers devised the amendment ratification process. For without a significant consensus -- a two-thirds majority in both houses of Congress and approval of three-fourths of the states -- such amendments will not succeed.

The consideration of S. 158 is an assault on the Bill of Rights, the balance of power, and on the rights and well-being of American women.

POLITICAL CONCERNS

Since the 1973 Supreme Court ruling, opponents of reproductive rights have organized to reverse or restrict that decision. The rhetoric and concerns of the so-called "right to life" groups have focused almost exclusively on the "rights" of the fertilized egg. The woman, who must bear the fetus for nine months and the fact that the fetus is totally dependent on the woman, become invisible. Accordingly, virtually all rights and concerns of the woman are viewed as expendable in order to preserve the fertilized egg from the moment of conception. In short, they are seeking to make motherhood mandatory.

For many of the groups that call themselves "pro-life," the abortion issue has taken on added dimensions. Today, abortion has become symbolic of what they see as a general social malaise. Seeking to deny women's reproductive rights has merged with their attack on the sexual freedoms and social changes of the 1960's and 70's, and clearly, an attack on the progress of the feminist movement and the independence of women.

Opponents of reproductive freedom marshall an array of false arguments to try to justify outlawing all abortions. Clearly there are serious problems with their perspective and use of the abortion issue.

First, a fertilized egg is obviously not "human life" in the way a newly born baby, child or adult is human life. A fertilized egg or fetus exists only as potential life.

Second, the issue of legal "personhood" as proposed in S. 158 and various constitutional amendments, is very different from identifying the biological beginning of human life. I refer you to the statement of Dr. Leon Rosenberg before the Subcommittee on April 24, 1981, for a full and articulate discussion on this point.

Third, the anti-choice approach trivializes the realities of women's lives. A whole range of circumstances can affect a woman's decision to terminate a pregnancy, including health and economic considerations. Perhaps another pregnancy will force her to quit the job she needs to supplement her husband's income and adequately provide for her existing children. Perhaps she is single and the victim of rape of incest. An unplanned pregnancy could be the "last straw" for an already strained marriage. Or the woman could actually be little more and a child herself, a teenager who knows nothing of birth control and finds herself pregnant. The decision to have an abortion is not trivial or easy for any woman to make.

The inner conflicts and hypocrasies of the so-called "pro life" position are deeply ironic. Those who emphatically oppose "government intervention" in their businesses, schools and lives actively promote government intrusion into the most personal and intimate aspects of our lives. Those who oppose the right to choose parenthood endorse the "right to choose" as fundmental in the business and economic arenas (note that conservative economist Milton Friedman's latest book is entitled Free to Choose). Those who claim to be "pro-life" tend to forget about the women whose lives and health would be imperilled by compulsory pregnancy. Those that claim to be "pro-family" deny the pervasive social changes of the past 20 years and the serious economic pressures confronting most American families today.

Those who claim to respect the traditional family and traditional values have, in effect, reduced and dehumanized the concept of "motherhood" to connote a mere biological fact. The tendency is to see motherhood as a punishment -- a burden women must bear for their sexual activity. Motherhood, for them, becomes a passive biological state, rather than the active acceptance of the long-term responsibilities and obligations of a parent.

The net affect of this virtual crusade against reproductive rights has been the elevation of the abortion issue to be the most emotionally volatile political issue of the day.

The question the "right to life" groups raise is the moral question: is abortion right or wrong in the individual woman's situation?

But the issue before the Supreme Court in 1973 and before the Congress now is the political question: who will decide the moral question?

THE RIGHT TO CHOOSE

Opponents of reproductive rights are motivated not out of concern about themselves seeking abortions, but by their desire to deny abortion as an option for all women. They seek to establish their moral views as public policy and impose their beliefs on all Americans. They answer the political question saying they should decide.

We answer the political question differently.

To answer the political question, the interest of the state (in protecting women's health and in the potential human life of the egg) must be balanced with, as Justice Blackmum wrote in Roe v. Wade, "the detriment that the state would impose upon the pregnant woman by denying this choice (of abortion) all together..." (Sex Discrimination and the Law, Babcock, Freedman, Norton and Ross eds., Little, Brown and Company, Boston, 1975, page 953).

The state's interest in protecting women's health is discussed at some length in Roe v. Wade, and we support the court's findings.

But when the cost of the "rights" of potential life is forced motherhood, clearly the state would impose too great a burden on women and their families.

As long as women bear children as a biological fact, we must be able to control whether and when to bear them.

As long as women remain primarily responsible for the care and rearing of children, women must be able to decide whether and when to take on those responsibilities.

Who is to decide the moral question? Each individual woman must be free to decide for herself.

The role of the state, in answering the political question, must be to protect the people against the imposition of one view on all, to guarantee the constitutional right of privacy, and to fully respect the religious and moral sensibilities of individual citizens.

The National Women's Political Caucus does not encourage or force women to seek abortions, but we are firmly committed to preserving the option of safe, legal abortion for all women.

We do not work to limit the rights of those who oppose abortion on moral or religious grounds to refuse abortion for themselves or to have and teach ethical, moral or religious values that disapprove of abortion, but we vigorously work to prevent the establishment of their values on all.

Once again, a poll has shown that the American people believe in the right to choose to have an abortion. In a recent survey by the Washington Post/ABC News (see the Washington Post, 6/8/81, page 1), almost three-fourths endorsed the right to choose abortion in all or most circumstances.

The small segment of the population that vigorously opposes reproductive rights is perceived, mistakenly we believe, to have disproportionate political influence. The abortion prohibition and court jurisdiction limitation on S. 158 are indicative of the lengths to which opponents of reproductive rights will go to impose their views on others.

We believe that the right to choose and freedom from excessive government intrusion in such personal matters are fundamental to the American form of government and our concept of liberty. For Congress to abridge these rights is unconstitutional, inappropriate, unwise and dangerous. We urge all Members of the 97th Congress to oppose S. 158.

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Dear Member of Congress:

The Physicians Forum is a national organization of physicians, actively engaged in the delivery of health care and opposed to all efforts to foreclose a woman's right to control her fertility through family planning and when necessary, abortion.

We are particularly concerned at this time about the Human Life Amendment introduced by Senator Jesse Helms as S158 and Congressman Hyde as HR900. Our experience has been that the decision to seek an abortion is rarely undertaken lightly by a woman. It is a serious matter. But we think that a woman must be allowed to make the choice for herself. And once the decision is made we, as physicians, feel we owe her the safety that is now inherent in competently performed legal abortions.

By making abortions illegal, as the Human Life Amendment proposes, Congress will not eliminate abortions. They have been with us throughout recorded history. Congress will, however, succeed in eliminating their safety.

We cannot accept the injustice and inequity of such a result.

We therefore urge you to vote against S158 (or HR900).

Sincerely yours

Anna T. Rand, M.D.

Anna T. Rand, M. D.
Chairman, Task Force on Reproductive Rights

ATR:ebz

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Statement of Faye Wattleton Submitted to the Senate Judiciary Subcommittee on the Separation of Powers

On Behalf of Planned Parenthood Federation of America, Inc.

This statement is being submitted on behalf of Planned Parenthood Federation of America and its 187 affiliates in 42 states and the District of Columbia. Planned Parenthood Federation of America is the nation's oldest and largest voluntary organization committed to the fundamental right of every American to decide when and under what circumstances to become a parent. On behalf of our affiliates, our clients and contributors, I feel compelled to share with you our deep concern over S. 158, the Human Life Statute.

For more than 60 years, Planned Parenthood has devoted all of its energies and resources to promoting voluntary family planning for all Americans. We've done so by encouraging and supporting the development of safe and dependable contraceptive care, and by working to remove the barriers that limit access to contraception for those who choose it. However, we recognize that there remain numerous instances in which the adequacy of the current methods of birth control, their unacceptability to some, and the difficulties experienced in their use by many couples lead to a significant number of unintended and unwanted pregnancies. As evidenced by the 1.5 million legal abortions voluntarily sought by women each year, abortion remains a necessary option for those women and couples for whom contraception has not proven successful in preventing unwanted pregnancies. It is imperative that this option continue to exist, and to exist under legal conditions.

S. 158 purports to be a simple congressional determination of fact. In actuality, however, it is designed to overturn, by reinterpreting the Constitution, the Supreme Court's decision in 1973 that a woman, in consultation with her physician, has a constitutional right to choose abortion. Although never mentioned as the purpose of the bill, S. 158 fundamentally would alter the legal status of abortion in the United States and abridge a woman's constitutionally-protected right to privacy, a right that the Supreme Court has on numerous occasions considered to be "no less important than any other right carefully and particularly reserved to the people." Further, S. 158 would accomplish that end by doing violence to the Constitution and to the vital system of Separation of Powers that is at the heart of our form of democracy and that it is the duty of this subcommittee to protect.

S. 158 is based on two faulty premises on the part of its supporters: First, that the judiciary as an institution was incapable in 1973 of defining when "human life" begins. And second, that the judiciary did not have access to the scientific information and evidence needed to resolve the issue, that it did not confront the "reality" of abortion and fetal development. Therefore, according to the supporters of S. 158, Congress should use its apparently superior ability to gather data and facts, subpoena witnesses and amass evidence to reach that determination on its own. These premises, and the conclusion to which they lead, however, reflect not only a gross misunderstanding of the Court's decision but also a misreading of the lengthy opinion it handed down.

In point of fact, the Court did fully examine and confront all the relevant data and evidence. In nearly an entire year of deliberation, the Court undertook an exhaustive study of all scientific data concerning fetal development, as well as virtually everything that had appeared in medical, legal, scholarly and scientific journals. It was privy to every piece of scientific data that has been presented to this subcommittee, and I am bound to point out that no fundamentally new scientific information on determining when actual human life begins has become known since 1973.

After its exhaustive research, the Court concluded that the question of "when life begins" is not one of scientific or medical fact. It is a matter of philosophy, ethics and religion, matters on which no consensus exists.

However, the Court concluded that, given the lack of consensus among scientists, philosphers and theologians, the "judiciary...is not in a position to speculate" as to when life begins in no way obviates the fact that the Court stated, in clear and precise terms only a few sentences before that " the word 'person,' as used in the 14th Amendment, does not include the unborn." This is the definitive ruling of the United States Supreme Court that S. 158 proposes to overturn.

If passed, S. 158 would, for the first time in history, consider a fetus, or even one cell with human genetic potential, as a person with full constitutional rights. By setting the rights of the zygote, embryo or fetus in competition with the rights of a woman, S. 158 clearly is intended to make abortion illegal nationwide. Yet, even the measure's staunchest proponents cannot agree on precisely what the effect of S. 158 would be. Some argue that states choosing not to outlaw abortion could find their laws challenged on behalf of unborn, yet constitutionally-protected, fetuses. Others argue that S. 158 would prohibit any state law or policy that subsidizes or aids abortion, such as voluntary Medicaid funding of abortion or the performance of abortions in public hospitals. Still others contend that S. 158 would prohibit the use of some of the most effective methods of contraception, including some low-dosage oral contraceptives and the intrauterine device. All, however, agree that S. 158 would give states a legal basis to outlaw abortion.

At a bare minimum, S. 158 would deprive thousands of American women of the right voluntarily, safely and legally to terminate unintended pregnancies. Deprived of this ability, thousands of desperate women would resort to illegal or self-induced abortions, often at an exorbitant physical and economic cost. According to Dr. Christopher Tietze, Senior Consultant of The Population Council, one could easily expect at least 750,000 illegal abortions a year if legal abortions were prohibited. Many of these women would suffer long-term irreversible physical health damage and others would die. Many thousands of other women would be unable to obtain any abortion and would be forced to carry their pregnancies to term and bear unwanted children.

Planned Parenthood came to its support of legal abortion from having seen the devastating effects on the lives and health of women by laws that made abortion illegal. They do not stop the procedures from occuring. Before the Supreme Court decisions in 1973 that made safe abortion accessible to thousands of women in need, we saw almost every day the faces of women confronting unwanted pregnancies. We saw the statistics and media accounts of hospital emergency rooms forced to mend, if possible, the victims of illegal and self-induced abortions. As a nurse, I had first-hand experience with the problems women faced in the years before abortion was legal. I saw many women who came into hospitals with incomplete abortions who were either desperately ill or who were unable to be treated successfully and subsequently expired. If S. 158 were enacted, it could turn back the hands of time and once again subject American women and their families to this preventable suffering and pain.

The collateral effects S. 158 would have on our system of jurisprudence are shrouded in uncertainty. If an embryo is considered a "person" under the Constitution, what would be the status of the estimated 20 to 40 percent of embryos who are discarded naturally in the early stages of pregnancy? What, if any, would be the woman's responsibility for their survival? If a fetus is given constitutional rights, would abortions be considered murder? Could a physician performing an abortion to prevent irreparable health damage to a woman be prosecuted for murder? Could a woman herself face criminal prosecution for seeking to obtain this necessary medical procedure? The further possible effects of giving a fetus full constitutional rights on our entire legal system -- on tort law, on criminal law, on contracts law, on property law -- are so vast that they would take years and perhaps decades of litigation to become known in their entirety.

While a consensus as to the precise moment at which "actual human life" and human personhood begins remains elusive, a nationwide consensus in support of legal abortion does not. The overwhelming majority of Americans disapprove of a measure such as S. 158. According to a recently-released Washington Post-ABC News poll, 73 percent of Americans approve of abortion in all or most circumstances. S. 158 would allow states to prohibit abortions even if the life of the woman were at stake although 88 percent of those included in the nationwide study would disagree with that policy. When asked specifically, over two-thirds of those polled would oppose a law that would make abortion murder.

Section 2 of S. 158, which would prohibit the lower federal courts from considering cases relating to abortion, would have devastating effects of its own. It would distinguish between the right to terminate a pregnancy and all other constitutionally-protected rights. An abridgment of any other right guaranteed in the Constitution could be heard in the federal court system while a threat to a woman's right to terminate an unwanted pregnancy, could not. The effect would be to make abortion a blacklisted constitutional right, inferior to all others. Our constitutional system recognizes no such artificial ordering of constitutional rights. This measure is damaging not only in its immediate effects on the ability of Americans to seek redress of grievances relating to abortion but also in the creation, as Professor Laurence Tribe has said, of a breach in the wall of constitutional protection. The ultimate dimensions of this breach, like so much else about the implications of S. 158, are unknown. If federal courts are prohibited from protecting the constitutional right to abortion, they may in the future be prohibited from upholding a citizen's right to a fair trial, or right to vote, or any other constitutional right at the discretion or even the whim of a majority of Congress.

As the voluminous testimony before this subcommittee indicates, the constitutionality of S. 158 is seriously doubted, even by vocal opponents of legal abortion. Whether constitutional or not, the statute would violate the conscientious beliefs of a majority of Americans. It would have severe, personal and economic consequences to individuals, and families as well as to society as a whole. It would have adverse and long-lasting effects on the lives, health and future of millions of American women and their families.

Eight years ago, the Supreme Court found no national interest sufficiently compelling to override these concerns. Eight years ago, the Supreme Court found no consensus among scientists, philosophers, theologians and ethicists on when life begins. None exists now. For all of these reasons, Planned Parenthood must strenuously urge this Subcommittee not to approve the Human Life Statute in any form.

PRETERM REPRODUCTIVE HEALTH CENTER, INCORPORATED

Preterm Reproductive Health Center was established in Washington, D. C. in 1971 as a private, not-for-profit facility. From its beginning, it has been one of PRETERM's goals to be more than an ordinary abortion clinic. A vasectomy, gynecological clinic and sex counseling services were added soon after the center was established. While the core medical service is abortion, there is a philosophical framework within which abortion services are provided -- a framework that seeks to confirm the dignity of women seeking abortion and to raise their expectations for good health -- mental and physical.

Additionally, PRETERM provides clinical training and education for students, residents and staff of the Departments of Gynecology and Obstetrics at George Washington University Hospital, Georgetown Hospital, Johns Hopkins Hospital, and others. Our reputation and credibility is evidenced by professional visitors who come from across the United States and from several countries to observe the PRETERM model of health care delivery. Hundreds of thousands of copies of detailed descriptive literature about PRETERM and its medical and counseling practices have been distributed.

Since 1971, PRETERM has provided abortion services to more than 80,000 women. Our patient profiles span all ages and socio-economic scales. We have learned in our 10 years of service that the choice of abortion must be available to all women in the event of an unwanted or unhealthful pregnancy. We believe further that:

- such procedures should be simple, safe, inexpensive and nontraumatic.

- the medical decision should not be constrained legally, nor should it be handed down by a physician alone, but entered into by the fully informed patient.
- every patient should have thorough counseling to apprise her of the facts, to help her examine her own feelings and wishes, and to inform her of all alternatives.

Because S. 158 robs women of their freedom to make choices about their lives, victimizes many who are already victims - those women and children who have experienced rape and incest - cripples families who may be unable to care emotionally or financially for another child, removes intensely complex personal decisions from the family framework and puts them into a public arena, we are strongly opposed to it.

Religious Coalition for Abortion Rights
100 Maryland Avenue, N. E.
Washington, D. C. 20002
(202) 543-7032

Statement on Senate Bill 158
May 20, 1981

The religious organizations listed below object strongly to the proposed Senate Bill 158 on theological, humanitarian and constitutional grounds.

The declaration that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception" reveals a woeful ignorance of the historical and religious concepts of life and humanity. No one disputes the fact that a physical human life form is created at fertilization and that, given the proper conditions, it has the potential for developing into a person. But to describe a human being strictly in terms of the physical ignores the essential aspect of the spiritual, that which makes a human different from other mammals. There is no agreement among religions as to when the developing fetus becomes a person; there is certainly no unanimous belief that the fertilized egg has equal value to the already born person who is in living relationship with God. For this reason we believe that this bill would codify one particular religious doctrine on the beginning of life, and hence would constitute an infringement on the First Amendment right of religious liberty.

Because we believe that a decision on whether to terminate a pregnancy or carry it to term must include consideration of the well-being of the woman and her family, as well as a concern for the developing fetus, we object to the absolutist position mandated by this bill. Although as individual religious groups we hold widely varying viewpoints on when abortion is morally justifiable, we are all agreed that there are circumstances when abortion may be a more moral alternative than the forced prolongation of a problem pregnancy. This bill shows a callous disregard of the tragedies of life which may lead an individual to choose abortion, and of the devastating damage to a woman and her family which can result from those tragedies.

Finally, we agree with the legal scholars who have declared this bill to be unconstitutional. We view it as a devious attempt to abridge a Constitutional right while circumventing the Constitutional amendment process. To allow Congress to reverse a Supreme Court ruling by the simple process of redefining the concepts involved in that ruling is a serious breach of the separation of powers upon which our government is founded. If this is allowed to happen we fear that it would set a precedent which could endanger the many other liberties guaranteed by the Bill of Rights and established by the Supreme Court.

We urge the Senate Subcommittee on Separation of Powers to reject Senate Bill 158.

National Ministries,
American Baptist Churches

American Ethical Union

National Women's Conference, American Ethical Union

American Jewish Congress

B'nai B'rith Women

Division of Homeland Ministries, Christian Church (Disciples of Christ)

National Council of Jewish Women

General Assembly Mission Board Presbyterian Church in the US

Union of American Hebrew Congregations

Unitarian Universalist Women's Federation

Office for Church in Society, United Church of Christ

Women's Division, Board of Global Ministries, United Methodist Church

Council on Women and the Church, United Presbyterian Church, USA

Women's League for Conservative Judaism

American Humanist Association

Women's Division, American Jewish Congress

Catholics for a Free Choice

Episcopal Women's Caucus

National Federation of Temple Sisterhoods

Committee on Women's Concerns, Presbyterian Church in the US

Unitarian Universalist Association

Board for Homeland Ministries, United Church of Christ

Board of Church and Society, United Methodist Church

The Program Agency, United Presbyterian Church, USA

United Synagogue of America

Young Women's Christian Assocation

NEWS

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FOR IMMEDIATE RELEASE
June 18, 1981

THEOLOGIANS VOICE OPPOSITION TO ANTI-ABORTION BILL

Forty prominent theologians and religious ethicists today issued an open letter opposing the proposed "human life" bill on the grounds that it poses "substantive religious problems." Among the signers were six past-presidents of the American Society of Christian Ethics, and Protestant, Jewish and Catholic scholars from nineteen states.

The bill is designed to overturn the 1973 Supreme Court decisions legalizing abortion by declaring that Congress finds that "actual human life" begins at fertilization and is therfore to be protected under the Fourteenth Amendment.

"'Human life' is not an acceptable definition of person," the letter said. "A person is a complex entity that cannot be reduced to a cluster of germinated cells.

"A definition of 'person' is not a matter of scientific findings but of religious or philosophical perspectives," the theologians asserted. The qualities of personhood "are bound up in the religious notion of *imago dei* (image of God)," they stated, and "this biblical notion cannot be reduced to a genetic code, physical form or any other physiological trait."

The letter argues that the effort to establish legislation on the premise that personhood exists from conception is an attempt to construct law upon religious doctrine, and, therefore, a violation of the principle of religious liberty.

(more)

MEMBERS: National Ministries, American Baptist Churches; American Ethical Union; National Women's Conference, American Ethical Union; American Humanist Association; American Jewish Congress; Women's Division, American Jewish Congress; B'nai B'rith Women; Catholics for a Free Choice; Division of Homeland Ministries, Christian Church (Disciples of Christ); Episcopal Women's Caucus; National Council of Jewish Women; National Federation of Temple Sisterhoods; General Assembly Mission Board, Presbyterian Church in the US; Committee on Women's Concerns, Presbyterian Church in the US; Union of American Hebrew Congregations; Unitarian Universalist Association; Unitarian Universalist Women's Federation; Board of Homeland Ministries, United Church of Christ; Office for Church in Society, United Church of Christ; Board of Church and Society, United Methodist Church; Women's Division, Board of Global Ministries, United Methodist Church; The Program Agency, United Presbyterian Church, USA; Council on Women and the Church, United Presbyterian Church, USA; United Synagogue of America; Women's League for Conservative Judaism; Young Women's Christian Association.

"Neither the value nor the meaning of religious liberty seems to be understood by those seeking to build a structure of law upon a foundation of religious dogma," it said.

The theologians further charged that "imposing the moral theology of some groups upon all Americans is tantamount to religious persecution. The principle to which our nation is committed is that no group shall be forced to live by the dogma of any other group."

The letter adds another component to the growing list of experts and authorities who have joined the campaign to block the "human life" bill. The National Academy of Science, the American Medical Assocation, six former U.S. attorneys-general, and a group of twelve constitutional scholars are among the groups which have issued statements opposing the legislation.

# # #

June 12, 1981

The Honorable John P. East
Chairman
Subcommittee of Separation of Powers
Senate Judiciary Committee
Washington, DC 20510

Dear Senator East:

Religious scholars and ethicists are currently giving critical attention to Senate hearings conducted to consider the "subject of when life begins for purposes of the 14th Amendment to the Constitution." Of special concern is the effort to define "person" as "all human life from the moment of conception or fertilization," and to give scientific credibility to that concept.

We recognize the wide divergency of views among religious persons and communities in the United States, and respect the right of people to believe the notion that a fertilized ovum is a person or human being. We all share the desire to reduce the need for abortion and reliance upon pregnancy termination as a method of fertility control.

However, we believe that abortion should be legally available for those choosing to terminate a problem pregnancy. We further believe that the "human life" bill poses substantive religious problems. Among these are the following:

1. "Human life" is not an acceptable definition of person or human being. We can all agree that a fertilized ovum is both "human" and "alive." The moral issue in the abortion debate concerns whether a conceptus is a person, not whether it is "life." Sperm and egg, prior to union, as well as every other body cell or tissue, are also "human" and "alive," but hardly qualify for protection as persons under the law. A person is a complex entity that cannot be reduced to a cluster of germinated cells. The language of the bill distorts the common meanings of terms in our vocabulary and thus introduces into the legal process a confusion which is unacceptable.

2. A definition of "person" is not a matter of scientific findings but of religious or philosophical perspectives. Biological facts, about which most of us agree, do not explain the multiple dimensions of personhood. Self-awareness, freedom, relatedness, a sense of purpose and meaning, as well as values, goals, commitments and loyalties also belong to what is meant by person. These qualities are beyond scientific definition, but are bound up in the religious notion of imago dei. There is, however, no biological equivalent of the image of God in humankind. Certainly, this biblical notion cannot be reduced to a genetic code, physical form or any other physiological trait.

3. The concern for religious liberty. The effort to establish legislation on the premise that personhood exists from conception raises two issues for religious freedom. The first is the attempt to construct law upon religious dogma. While the right of any religious community to believe or teach doctrine based upon speculative reason or esoteric metaphysics is fully supportable, it is a violation of the principle of religious liberty to enact legislation based upon such doctrines. No consensus exists among various religious traditions in this pluralistic society regarding the moral value or personal status of the fetus. Neither the value nor the meaning of religious liberty seems to be understood by those seeking to build a structure of law upon a foundation of religious dogma.

   The second issue concerns the direct and indirect legal sanctions which would be imposed upon those who, on the basis of their own religious convictions, may choose an abortion. Imposing the moral theology of some groups upon all Americans is tantamount to religious persecution. The state has no right to execute religious law, and every citizen has a constitutional right to freedom from the imposition of religious doctrines which are distasteful or unacceptable. The principle to which our nation is committed is that no group shall be forced to live by the dogma of any other group. This freedom is directly threatened by the "human life" bill.

These concerns compel us to voice our opposition to S. 158 (and H.R. 900). We call upon religious leaders to examine these bills carefully and express their reaction through appropriate channels and in the light of their own religious perspectives. We also call upon our leaders in Congress to oppose this legislation for the several reasons cited above.

Sincerely yours,

Waldo Beach
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American Society of Christian Ethics
Professor of Christian Ethics
Duke University
Durham, NC

Victor Obenhaus
Past-President
American Society of Christian Ethics
Professor of Christian Ethics-Retired
Chicago Theological Seminary
Chicago, IL

E. Clinton Gardner
Past-President
American Society of Christian Ethics
Professor of Christian Ethics
Emory University
Atlanta, GA

Douglas Sturm
Past-President
American Society of Christian Ethics
Professor of Religion & Political Science
Bucknell University
Lewisburg, PA

Charles West
Past-President
American Society of Christian Ethics
Professor of Christian Ethics
Princeton Theological Seminary
Princeton, NJ

J. Phillip Wogaman
Past-President
American Society of Christian Ethics
Dean and Professor of Christian
Society Ethics
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Harvard Divinity School
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Reproductive Rights National Network

17 Murray Street, New York, N.Y. 10007 - (212) 267-8891

TESTIMONY IN OPPOSITION TO S.158

The Reproductive Rights National Network is an activist feminist network of over 70 local community groups and organizations across the country, located in urban and rural settings. Our purpose is to organizae and educate women and men in workplaces, unions, schools, healthcare facilities and communities regarding reproductive rights. We believe that reproductive freedom includes not only the right to abortion and freedom from sterilization abuse, but also good, safe birth control, childcare, sex education in the schools, the right to conduct one's sexual life as one chooses, and an end to nuclear, chemical and occupational hazards to our reproductive systems. Our work includes dissemination of literature, speaking engagements and public actions.

Committee for Abortion Rights and Against Sterilization Abuse (CARASA) is an activist organization fighting for reproductive freedom for all women. We believe that women must be able to control for themselves whether and under what conditions they will have children. We understand that in order to have real choices and therefore control of their reproductive lives, there must be safe, reliable birth control and abortion, regardless of economic status or age, protection from sterilization abuse, child care supports, income sufficient to support a family, and the right to live freely as a lesbian.

All women must have the access to safe abortions, regardless of income. S.158, and Medicaid abortion cutbacks, will force poor, minority and working women into unwanted childbirth, backstreet abortions and unwanted or forced sterilizations. We oppose S.158 which will deny all women their reproductive rights by attempting to make all abortions illegal. We oppose S.158 which will make every woman who has an abortion a criminal.

S.158 says that "human life" begins with conception. It would allow each state to prohibit all abortions, even those needed to save a woman's life. The survival of a fertilized egg will become more important than the survival of a woman. Backers of S.158 claim they are concerned with "the life of the fetus". This claim only hides their total denial of the HUMAN RIGHTS OF WOMEN: The backers of S.158 also support legislation to cut funds for child care and the care of our older people; to cut funds for the protection of battered women and abused children; to cut funds for health care and public education; to deny basic civil rights to lesbians and gay men; and to cut affirmative action programs that open better paying jobs to women and minorities.

The impact of Senate Bill 158 upon the lives of indigent women would be devastating. Poor women have less access to quality and primary health care than do other women. S.158 would prevent poor women from choosing abortion when faced with high risk pregnancies and inadequate medical care. Quality primary health care includes safe, legal abortion as well as adequate prenatal services.

Indigent and minority women do not have the same access to health care as do more affluent women in our society. The poor tend to live in the ghettoes and barrios of our large urban centers and in depressed rural areas. These areas more frequently than not have been designated by the federal government as medically underserved areas,[1] or health personnel shortage areas.[2] This has a particularly critical impact upon women, who require more primary care during their childbearing years than do men.[3] In the areas where poor women live, there are not enough physicians and allied health personnel to conduct these women safely through their pregnancies and provide adequate birth control counseling and devices to permit family planning.

The health status of poor women in general is worse than that of more affluent women, and thus the lack of obstetrical and gynecological care has a devastating impact on the health of indigent women.[4] It is widely recognized that prenatal care is essential to the health and well-being of both mother and infant.[5] Prenatal detection of hereditary diseases, congenital defects and other medical conditions is a significant aid in identifying high-risk pregnancies and prescribing care to minimize damage to the health and risk to the life of the mother and child. Furthermore, it is generally accepted that prenatal care should begin in the first trimester of pregnancy. Yet in 1976 only 65 percent of low-income women with live births saw a physician during the first three months of pregnancy, compared with 85 percent of medium-income women and 96 percent of high-income women.[6] Compared with statistics from 1970, this represents an 11 percent increase

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1. 41 Fed. Reg. 45718-45777 (Oct. 15, 1976).
2. 44 Fed. Reg. 46182-46234 (Aug. 6, 1979).
3. Aday, Anderson and Fleming, Health Care in the United States: Equitable for Whom? at 104, Table 3.4 (1980).
4. Health Status of Minorities and Low-Income Groups, HEW Publications No. (HRA) 79-627 (1979) at 105.
5. Health USA 1979, HEW Publication No. (PHS) 80-1232 at 120.
6. Aday, *supra*, note 3, at 118.

in early prenatal care for high-income women and a 7 percent increase for medium-income women, but a 1 percent decrease for low-income women.

The lack of prenatal care is directly related to low infant birthweight (prematurity), a leading indicator of infant morbidity and mortality. The infant mortality rate in 1960 was 17 times higher among low birthweight infants than among normal birthweight infants.[7] Furthermore, during 1975-77, approximately twice as many black infants as white infants had a low birthweight, and the proportion of low birthweight infants was declining 400 precent faster for whites than for blacks.[8]

Thus, S.158 only further denies poor women quality primary health care by denying them (and all women) the right to safe and legal abortions. S.158 condemns indigent women and their infants to even more exaggerated maternal and infant mortality and morbidity than they already suffer.

The only alternative would be to undergo unwanted sterilization in order to reduce these risks. Thus, S.158 would give poor women the "choice" of too many unwanted, high-risk pregnancies, or no pregnancies at all. Additionally, without the right to abortion, an increase in forced sterilization and related abuses can be expected as occurred in the 1960's and early '70's before abortion was legalized in this country.[9]

In the alleged name of protecting "human life", unconscionable misery and discrimination would be inflicted upon poor women - and all women - of this nation if S.158 were to be enacted.

Submitted on June 18, 1981, by:

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(cont...)

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* For identification purposes only.

[7] Health USA, *supra*, note 5 at 120.

[8] *Id*.

[9] See, e.g., *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C.1974).

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SOCIOLOGISTS
FOR WOMEN
IN SOCIETY

Department of Sociology
Brooklyn College
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Brooklyn, New York 11210

Sociologists for Women in Society is a 1500-member organization of women and men sociologists. We have 27 state and regional chapters. Our members are committed to research and political action on the status of women in contemporary society. S. 158 will limit our members' options both personally and professionally.

Sociological research has shown that the extent of a woman's involvement in economic and political life outside the home is directly linked to her ability to control her fertility. Drastic limitations on the right to choose when and if to bear a child would severely diminish our members' --and every woman's--potential for professional and political participation.

Another major premise of sociology which S. 158 affects is the definition of personhood. A person is not defined by biological viability but by social relationships with people. S. 158 would protect fetuses with coercive social relationships, sacrificing the rights to privacy and individual choice and loving family relationships of women and men in the interests, not of bits of living tissue, but of a state-imposed morality.

As women and men sociologists committed to professional and personal freedom and respect for the individual's rights, we cannot condone restrictive, potentially punitive laws such as S. 158.

Judith Lorber, Ph.D.
President

June 3, 1981

SOUTHEASTERN PENNSYLVANIA TASK FORCE ON ABORTION RIGHTS

We, the undersigned are organizations committed to the protection of women's health and reproductive freedom. We are united in our opposition to the proposed Human Life Amendment and Human Life Statute because they both have the purpose and effect of restricting access to safe, legal and funded abortion and birth control.

We believe that the decision to raise children or to have an abortion should be left to the individual woman, in consultation with her doctor. The government has no business deciding when, where or with whom women should have children.

The Human Life Statute makes a mockery of our Constitutional system by attempting to define the fetus as a person. The Courts must define the Constitution not Congress. Further, our law must recognize that the rights of women take precedence over fetal rights.

ACLU of Philadelphia
Americans for Democratic Action
Clara Bell Duvall Education Fund
CHOICE
Christian Association
Congresso de Latinos Unidos
Democratic Soc. Org. Committee
Elizabeth Blackwell Center
Episcopal Community Service
Family Planning Service - CCMC
Feminist Therapy Collective
Graduate Hospital
Health Law Project
Juvenile Law Center
Lutheran Settlement House
Medical College of PA
NARAL of SE PA
NARAL of PA
NOW of PA
Penn Women's Center
PA for Justice & Freedom of Choice
People's Emergency Center
Philadelphia Lawyer's Guild
Phila. Reproductive Rights Coalition
Philadelphia NOW
Planned Parenthood - Bucks Co.
Planned Parenthood - SE PA
Puerto Rican Alliance
Religious Coalition for Abortion Rights
Reproductive Health and Counseling Center
Welfare Rights Organization
Women Associates
Women Organized Against Rape
Women's Health Concerns Committee
Women's International League for Peace and Freedom - Bucks Co.
Women's Law Project
Women's Political Caucus
Women's Project - American Friends Service Committee
Women's Resource Center
Women's Suburban Clinic
Women's Switchboard
YWCA - Central Montgomery County

STATEMENT

OF

RABBI ALEXANDER M. SCHINDLER, PRESIDENT
UNION OF AMERICAN HEBREW CONGREGATIONS

I am Rabbi Alexander Schindler. I serve as President of the Union of American Hebrew Congregations, the national congregational body of Reform Judaism, representing over one million people in approximately 750 congregations.

At our 1975 Biennial Convention, two thousand delegates representing their congregations in democratic fashion, voted overwhelmingly to support the constitutional right of a woman to obtain a legal abortion if she freely chooses to do so, as determined by the Supreme Court in 1973. The resolution reads in part:

> The UAHC reaffirms its strong support for the right of a woman to obtain a legal abortion on the consitutional grounds enunciated by the Supreme Court in its 1973 decision in Roe v. Wade, 410 U.S. 113 and Doe v. Bolton, 410 U.S. 179, which prohibit all governmental interference in abortion during the first trimester and permits only those regulations which safeguard the health of the woman during the second trimester. This rule is a sound and enlightened position on this sensitive and difficult issue, and we express our confidence in the ability of the woman to exercise her ethical and religious judgment in making her decision.
>
> The Supreme Court held that the question of when life begins is a matter of religious belief and not medical or legal fact. While recognizing the right of religious groups whose beliefs differ from ours to follow the dictates of their faith in this matter, we vigorously oppose the attempts to legislate the particular beliefs of those groups into the law which governs us all. This is a clear violation of the First Amendment. Furthermore, it may undermine the development of interfaith activities. Mutual respect and tolerance must remain the foundation of interreligious relations.
>
> We oppose those riders and amendments to other bills aimed at halting medicaid, legal counselling and family services in abortion-related activities. These restrictions severely discriminate against and penalize the poor who rely on governmental assistance to obtain the proper medical care to which they are legally entitled, including abortion.
>
> We are opposed to attempts to restrict the right to abortion through constitutional amendments. To establish in the Constitution the view of certain religious groups on the beginning of life has legal implications far beyond the question of abortion. Such amendments would undermine constitutional liberties which protect all Americans.

This resolution conforms to Judaism's traditional concern for the sanctity and protection of human life. While Judaism teaches a responsible attitude toward the moral question of abortion, it is not considered to be murder. Rabbinic law assigns the fetus no juridical personality; it does not regard it a 'nefesh,' a living person until it leaves the womb. Jewish legal tradition is based on a portion of the Mosaic Code in Ex. 21:22:

> If men strive and wound a pregnant woman so that her fruit be expelled, but no harm befall her, then shall he be fined as her husband shall assess, and the matter placed before the judges. But if harm befall her, then thou shalt give life for life.

The law is quite clear: The penalty for abortion of the fetus is monetary compensation. Abortion is not a capital crime because no murder is involved. Causing the death of the woman was clearly considered murder for which the punishment was death. A similar view is emphasized in the Mishna, the code of Jewish law which was published in 200 c.e. Mishna Ohalot 7:6 states that -

> A woman who is having difficulty in giving birth, it is permitted to cut up the child inside her womb and take it out limb by limb because her life takes precedence. However, if the greater part of the child has come out, it must not be touched, because one life must not be taken to save another.

> Thus to save the life of the mother, the fetus may be destroyed, but not the living child.

Rashi (11th century), a most distinguished and revered commentator on the Bible and Talmud, explains the passage in the following way:

> As long as the child did not come out into the world, it is not called a living being and it is therefore permissible to take its life in order to save the life of its mother. Once the head of the child has come out, the child may not be harmed because it is considered as fully born, and one life may not be taken to save another.

Maimonides (1135-1204), another distinguished scholar further explains:

> ...when a woman has difficulty in giving birth, one may dismember the child in her womb --either with drugs or by surgery-- because it is like a pursuer trying to kill her...

Here, even where we are dealing with the latest stages of pregnancy, feticide is not regarded as homicide, and we are spared the painful dilemma of choosing between human life and human life.

Various Responsa indicate that abortion is permissible even if it is not to save the life of the woman. In case of rape, for instance, a woman "need not nurture seed implanted within her against her will; indeed, she may 'uproot' seed illegally sown (Resp. Or Gadol, No. 31, 1891). Rabbi Jacob Emden (1697-1776) permits abortion for "great need" - even if only to save the woman from "great pain" (She'elat Yavez 1:43). Rabbi Israel Meir Mizrachi also equated serious mental-health risk with physical health-risk (Resp. Pri Ha Aretz, Vol. III Jerusalem, 1899).

Rabbi Solomon B. Freehof, one of the greatest modern commentators on Jewish Law, refers to the Talmudic principle that the fetus is a part of its mother and has no independent life. Therefore, just as a person may sacrifice a part of herself, such as an arm or a leg, to be cured of a worse sickness, so may she sacrifice this part of herself. Jewish Law sanctions, at times even requires, abortion when the life and well-being of the woman commend such a step.

Dr. David Feldman, a Conservative rabbi, who is a recognized expert in the field of Jewish Law, states:

> The rights of the foetus, therefore, are quite secondary to the rights of the mother. She is a living human person now; the foetus is not yet a human person. The slogan we hear nowadays, "right to life," confuses this principle. When we are speaking about abortion, the issue is not at all "right to life" but, rather "right to be born." It must be stated that, in Jewish Law, there exists no right to be born, only a right to life of persons who already exist. The use of the word "persons" here is also important.
>
> Those who oppose abortion on grounds that it is a denial of the right to life point to evidence that life begins early in the foetal stage. Yes, life may begin early, but our question still has to be: What kind of life? There is human life, animal life, plant life. Rabbinic Law has determined that human life begins at birth.

There is a wide divergence of opinion concerning the specific circumstances under which an abortion would be morally justified, with Orthodox rabbis generally taking a more restrictive position and Conservative and Reform rabbis a more liberal stance. There are similar differences within many Protestant denominations, as well as differences between faith groups about the question of when human life begins. Even within Catholicism there are prominent theologians, like Father Charles Curran of Catholic University, who accept Catholic teaching on the morality of abortion but who do not want to see this teaching enacted into civil law due to the lack of consensus in American pluralistic society.

The historic 1973 Supreme Court decision states:

> The Constitution does not define 'person' in so many words. The use of the word is such that it has application only post-natally. The unborn have never been recognized in the law as persons in the whole sense.

In his opinion, Justice Blackmun wrote:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary,..is not in a position to speculate as to the answer.

For this reason, Reform Judaism has consistently opposed all efforts to subvert the 1973 Supreme Court decision which allows all religious groups the widest latitude in freely exercising their religious rights according to their understanding of the will of God. Similar testimony was presented before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives in 1976, in the hope that this would end attempts to impose the religious views of one group on all others in the United States,

The proposals currently under consideration by this Subcommittee on the Constitution are of even greater concern to us, for all define the fetus in terms at variance with Jewish tradition. Proposed Amendment SJ Res 17 defines a fetus as a person "at every stage of its biological development" and further provides for legal abortion only "to prevent the death of the mother" which is contrary to normative Judaism.

Proposed Amendment SJ 19 would declare a fetus to be a human being from the "moment of fertilization" which not only runs contrary to Jewish Law, but which automatically has the additional effect of making the use of such contraceptive devices as the pill and the IUD illegal. The Union of American Hebrew Congregations has long been on record as supporting "the right of all persons... to practice birth control as they see fit." This concern was voiced in a resolution passed in 1959 which is based on traditional Jewish emphais on the "importance ...the well-being and the security of the family."

The proposed Human Life Statute, Legislation S 158, which would change the Fourteenth Amendment to declare that a person exists from the moment of conception, is also contrary to normative Judaism.

If enacted, all such legislation would prevent the majority of Jews from the free exercise of their religion. Two examples will illustrate the problem. Rabbis are sometimes called upon for counseling in cases where it has been determined that the fetus will be born suffering from Tay Sachs, a Jewish genetic disease which cannot be detected until the second trimester. There is no known cure. Such children die an agonizing death by the time they are five years of age. Rabbis would be prevented from counseling such women in their anguish, for to counsel abortion, which would be permissible under Jewish Law, would place the rabbi in jeopardy of being considered an accessory to murder. The woman would be prevented from exercising her religious convictions for she would be open to the charge of murder. It would be illegal for both to follow their religious consciences under the proposed legislation. Or, a woman suffering from a neurological disease, like muscular dystrophy, on becoming pregnant, is told by her doctor that she could become paralyzed if she carries the fetus to term, causing her irreparable physical and mental harm. If, in her pain, she turns to a rabbi for advice, both would be prevented from acting according to the principles of Jewish Law which consider that the health and welfare of the woman take precedence over the potential life of the fetus.

We also oppose all attempts to remove legislation regarding abortion from the jurisdiction of either the lower Federal Courts or the United States Supreme Court. Historically, the Federal Courts have been the greatest protectors of religious freedom, ensuring the preservation of our liberty in every State in the land.

Legislators should be aware that passage of these amendments and statutes that make abortion illegal will not end abortion any more than the passage of the Prohibition Amendment ended the consumption of alcohol or the problem of alcoholism. Passage of the Prohibition Amendment drove the problem underground, creating greater problems for society. Passage of the proposed legislation simply means that more women will die of illegal abortions.

The Union of American Hebrew Congregations has consistently opposed restrictive abortion laws which result in "illegal abortions that take a tragic and needless toll." A resolution was passed at the Biennial Convention in 1967 urging "states to permit abortions under such circumstances as...threats to the physical and mental health of the mother, rape, incest and the social, economic and psychological factors that might warrant therapeutic termination of pregnancy."

The vocal minority that would impose its religious views on all Americans claims that they are pro-life and that we are not. This is manifestly a malignity. We too affirm life. Judaism makes it a summum bonum, a bright and shining star in the firmament of its commandments. We are commanded to choose life and live it fully. It is because we affirm life and value family stability that we insist that parents be free to determine precisely how many children they can properly feed and educate and love. It is because we affirm life that we insist that all women be free to choose just when and under what conditions they bring life into this world.

It is precisely because we value life that we are opposed to accidental and indiscriminate reproduction in a world which is already overpopulated and underfed. The cries of emerging life are a delight. But we must also hear the silent crying of parents who see the bloated bellies of their starving infants and are helpless to give them surcease.

The vocal minority grows more shrill, more intense and more intolerant of those who differ with their theology. Members of twenty-seven faith groups, representing the majority of the American people,were accused of sacrilege when they gathered to worship in peace in our nation's capital to celebrate the eighth anniversary of the Supreme Court decision allowing freedom of choice. Such bigotry is discordantly alien to the principle of diversity which has guided our nation since its founding.

It is precisely this difference in theological belief that forms the basis of the controversy regarding abortion.

It is precisely this type of religious controversy our founders sought to prevent by adopting the First Amendment. The maintenance of our democratic ideals of liberty and justice requires that legislators avoid pressure to adopt the theology of any one religious group as the law of the land. Proposed legislation would undermine this basic principle that has enabled all religions in flourish in the United States.

UNION W.A.G.E.

P.O. BOX 40904 SAN FRANCISCO CA, 94140

(415)
282-6777

May 29, 1981

To Members of the Senate Subcommittee on Separation of Powers:

Union Women's Alliance to Gain Equality (Union W.A.G.E.) is an organization of working women, including those who for the moment are unemployed, retired or on welfare. Our members are working both in union jobs and in unorganized situations. We have 300 members nationally, most of them concentrated in the San Francisco Bay Area, and our bimonthly newspaper reaches about 3000 nationwide. Our constituency is much larger than that, however, for we represent people with little time for politics or voice in public affairs. Working women play a key and increasingly important role in the economy, a fact not reflected in their political power because of historical injustice.

S158 will directly and adversely affect our membership. Most women who work do so out of economic necessity, and still earn only 59% of what men do. The number of women heads of households is increasing, as if the number of women who are poor. This trend has been called the "feminization of poverty." Add to this picture the fact that more than half of divorced men default on child support payments within a year of divorce, and you begin to understand what the anti-abortion movement is trying to do. By denying women control over their reproductive function, the movement is trying to present women with the alternatives of: 1) sexual abstention 2) staying with a man no matter what, because you can't afford to live without him, or 3) poverty for women and their children. For women who are married and working, but faced with an unwanted pregnancy, it can still mean the difference between poverty and relative comfort for the entire family.

In this social context, the anti-choice movement is using poverty as a threat to keep the traditional family together, with control firmly in the hands of the male.

Faced with such desperate alternatives, many women will seek illegal abortions, and many will die from them as they have in the past. The self-styled "right to life" movement discounts women's lives. Since we are working women, we are the chief target of these attacks, and we do not take our lives so lightly.

We see the anti-abortion movement as an attempt to impose a particular morality, shared by a small number of Americans, on all American women. No such standard of morality is expected of men.

Women still bear the lion's share of responsibility for raising children in our society, whether they are married, single, widowed or divorced. This imposes an economic responsibility on women which is the major reason for the feminization of poverty.

As as organization dediceted to the economic betterment of women workers, we support the right of women to decide whether they will have children and how many children they will have. The only real guarantee of this right is access to free and safe abortions and an end to forced sterilizations.

Women's lives are human lives. They are our lives, and we think they rate more importance than a fertilized egg.

Sincerely,

Joyce Maupin

Joyce Maupin
President

A Statement from the Coordinating Center for Women in Church and Society of the United Church of Christ

For a decade the General Synod of the United Church of Christ has supported freedom of choice concerning abortion. We firmly believe that a responsible position concerning abortion should be based on a consideration of the rights of the individual woman, her potential child, her family and society,

Based on our long standing commitment to freedom of choice the Coordinating Center for Women in Church and Society of the United Church of Christ opposes the intent of Senate Bill 158 because:

1. It attempts to define "personhood" when there is no theological nor scientific agreement as to definition;

2. It jeopardizes religious freedom by enacting into law the view of one faith group and imposes it on all;

3. It denies women the right to make responsible reproductive choices and potentially endangers their life and health.

Standing in the Hebrew-Christian tradition, we affirm God as the Source of life - our life, all life. God has called us to share in the work of creation with the Creator, giving us the privileges and responsibilities bound to that freedom.

Our religious heritage stresses reverence for human life. Like those who oppose freedom of choice the enhancement of human life and the protection of the rights of persons is important to us. Like them we support laws intended to protect those who cannot protect themselves. Unlike those who would deny women the freedom to make responsible choices, we also affirm laws which protect and value human beings in all their diversity.

Inevitably we are all called upon to judge or make assumptions as to when human life begins, at what point the church and society have an interest in it and assume a responsibility toward it. As each of us develops our own theological response to these questions, many persons would acknowledge the potentiality of personhood of the embryo in its early stages, although we are increasingly aware of the difficulty of developing a consensus about when human life begins. SB 158 would, however, declare "legal personhood" to unborn offspring at every stage of their biological development. This sweeping declaration in the face of conflicting theological as well as scientific views of the beginning of life, make the passage of such a bill unwise and irresponsible. It is inapppropriate for the Congress of the United States to presume to define "personhood" when a clear and agreeable definition has not been found by theologians and members of the scientific and medical professions.

Secondly, we believe that our religious freedom would be jeopardized by enacting into law one definition of personhood which clearly does not express the religious convictions of many persons in this society. In order to protect the right of every woman to follow the dictates of her conscience or her faith's religious teachings, we strongly oppose SB 158, a bill which would impose what is a religious belief of one group of persons on those who do not share it.

Third, the bill threatens the physical and emotional health of women, removes from them the right to make responsible choices about their own lives and bodies, and restricts the exercise of responsible religious conscience in making such decisions.

Victims of rape and incest would be forced to bear the burden of continuing the resulting pregnancy to term. The damage to the lives of these women and children who are victims of such violence would be multiplied many times over; their pain and suffering would be the burdens of a life time. To be denied the opportunity to make any choice denies women their personhood and relegates them to a less than human status.

Some women who cannot support a pregnancy will die; disabled, damaged children will be born into lives of pain and suffering. Desperate women will be subjected to unsafe, unlawful, back alley abortionists. Responsible family planning will be jeopardized because some forms of birth control would be criminalized. The proposed bill is a massive invasion of privacy which goes beyond present law, and goes far beyond making abortion illegal, as it was in most states before 1973.

As people of faith we affirm the right to reproductive freedom of choice for all women. We oppose, as an act of compassion and justice for all women, the passage of laws which restrict or deny the rights of one segment of society - namely women - while essentially giving a higher level of personhood to another segment - the unborn. We also believe it is impossible to legally define personhood without seriously jeopardizing our religious freedom. For these reasons, we oppose the passage of Senate Bill 158.

UNITED CHURCH BOARD FOR HOMELAND MINISTRIES
Howard E. Spragg, Executive Vice President
DIVISION OF HEALTH AND WELFARE
Helen Webber, General Secretary

TESTIMONY ON THE PROPOSED FETAL PERSONHOOD BILL (S.158) BY HELEN WEBBER, GENERAL SECRETARY, DIVISION OF HEALTH AND WELFARE, UNITED CHURCH BOARD FOR HOMELAND MINISTRIES TO THE SENATE SUBCOMMITTEE ON THE SEPARATION OF POWERS.

My name is Helen B. Webber. I am General Secretary of the Division of Health and Welfare, United Church Board for Homeland Ministries. The U.C.B.H.M. is the national mission board of the United Church of Christ which has one million, eight hundred thousand members in over six thousand congregations located in every state but Alaska.

In 1970 the U.C.B.H.M. was the first Protestant denomination to call for the legal option of abortion. The following year, the U.C.C. Eighth General Synod voted that, "The theological and scientific views on when human life begins are so numerous and varied that one particular view should not be forced on society through its legal system." The General Synod then called for "the repeal of all legal prohibition of physician-performed abortions." The Ninth General Synod affirmed "the Supreme Court decisions of January 22, 1973, removing the legal restrictions on medical termination of pregnancy through the second trimester." The Eleventh and Twelfth General Synods also endorsed the constitutional right of a woman to follow the dictates of her conscience when facing a problem pregnancy.

Through these statements, the United Church of Christ has recognized various viewpoints and beliefs about when life begins, both within its own membership and in the larger society. Hence the United Church Board for Homeland Ministries speaks in support of not only a woman's right to choose but also every individual's right to follow the dictates of his/her conscience in matters regarding family planning and abortion.

If passed, the Fetal Personhood Bill (S.158) would restrict the precious rights of conscience, personal choice and religious liberty that are central to the United Church Board for Homeland Ministries' and General Synod's positions on abortion and family planning. It would ultimately restrict the right of our United Church of Christ pastors and related counselors and medical professionals who choose to provide unbiased supportive counseling, educational and medical services which assist a woman in acting responsibly regarding family planning and pregnancy.

Because we believe that a woman's decision regarding termination of pregnancy is ultimately a private decision between herself and her Creator, we speak in opposition to the passage of the Fetal Personhood Bill (S.158). The U.C.B.H.M. urges the Congress to protect the citizenry's right to freedom of conscience by defeating this proposed legislation.

Submitted by

Helen B. Webber

June 16, 1981

NEBRASKA CONFERENCE OF THE UNITED CHURCH OF CHRIST

Resolution On Proposed Human Life Legislation

Whereas After careful study and debate the Nebraska Conference of the United Church of Christ at its 1979 Annual Meeting held in Omaha approved a resolution affirming the right to choice regarding abortion and making the Conference a member of the Nebraska Religious Coalition on Abortion Rights, and

Whereas Given the gradual developmental nature of human life in all stages of life, it is impossible to locate the precise biological or spiritual moment when human life begins, and

Whereas The right to decide to terminate a pregnancy is a matter of freedom of conscience, personal choice and religious liberty, and

Whereas Two pieces of proposed federal legislation, HR900 and S158, currently being considered by House and Senate committees violate these principles of human rights and religious liberty and circumvent scientific opinion, and

Whereas The proposed legislation, which attempts to answer an essentially unanswerable question, will cause further divisiveness in our nation and in our churches rather than a thoughtful examination of issues, and

Whereas The proposed legislation would make some widely used forms of birth control illegal, and

Whereas The proposed legislation would have implications affecting the clarity of inheritance, custody, legal age, homicide, child welfare aid and other legal statutes,

Therefore be it resolved that the Nebraska Conference of the United Church of Christ at its 1981 Annual Meeting

1. Reaffirms its 1979 Resolution making the Conference a member of the Nebraska Religious Coalition for Abortion Rights, and

2. Supports the work of the Nebraska and National Religious Coalition for Abortion Rights to promote pro-choice alternatives regarding abortion in the United States, and

3. Voices its opposition to the currently proposed legislation, HR900 and S158, and

4. Directs the Nebraska Conference Board of Directors to communicate this resolution to Nebraska legislators in the United Sates House of Representatives and the United States Senate, and

5. Urges United Church of Christ members in Nebraska to communicate their concerns and views to their legislators in the United States House of Representatives and the United States Senate, and

6. Requests the United Church of Christ Office of Church and Society and United Church of Christ President Avery Post to pursue this matter on our behalf.

UNITED STATES WOMEN'S HEALTH COALITION
1717 Massachusetts Avenue, N.W., Washington, D.C. 20036 U.S.A.
(202) 387-4510 Cable: USWOMEN

June 18, 1981

STATEMENT OF THE UNITED STATES WOMEN'S HEALTH COALITION FOR THE SENATE JUDICIARY SUBCOMMITTEE ON SEPARATION OF POWERS

S. 158

The United States Women's Health Coalition is a private, non-profit organization representing 37 women's clinics providing services in 10 states.

In many of our facilities we are serving lower income women who rely on low cost services for access to the specialized health care created by women's reproductive functions. Among their services some of our facilities provide abortion. Passage of S. 158 and the inevitable court batttle that will follow will cause misery not only to these women but to their families because women turn to abortion as a means of enhancing their families' quality of life. When we turn to the possibility that several popular and safe contraceptive technologies may also be banned the situation becomes even more frightful. Those women with money will find a way to exercise their natural rights in life and poor women will not. In fact, the passage into law of S. 158 would make things revert to the pre-1973 era when abortion was for the most part illegal, yet statistics indicate that middle class and wealthy women nevertheless exercised their rights and poor women were penalized.

Because we have been so close to the situation for more than a decade we fear that passage of this law would mean a return to the double standard of before 1973. At that time there were two sets of laws--one for women with money and one for women without money. For these reasons among many others we oppose S. 158.

War Resisters League
339 Lafayette Street, New York, NY 10012 212-228-0450
Cable Address: Nonviolent New York
Affiliated with War Resisters' International and International Confederation for Disarmament and Peace

NATIONAL COMMITTEE
Scott Abbott
*Bent Andresen
†Norma Becker, Chairwoman
Karl Bowen
Dorie Bunting
*Mark Cohen
*Susan Cohen
*†Sybil Claiborne
*Jerry Coffin
*Lynne Shatzkin Coffin
*Ernie Coleman
Ann Davidon
Ruth Dear
*William Douthard
*†Robert Ellsberg
*Kathy Engel
Chris Field
Larry Gara
Diane Hennigan
Peter Kiger-Chamberlain
*Connie Ladenburg
Irene Mwangi
Liz Roget
*Murray Rosenblith
Vic Schumacher
*Wendy Schwartz
Joanne Sheehan
Bobby Siwak
*Allan Solomonow
Jim Sperry
Dorie Wilsnack
Beverly Woodward

and one member
from each WRL local

*Executive Committee
†Steering Committee

STAFF
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REGIONAL OFFICES
WRL/West
1360 Howard Street
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415-626-6976

WRL/Southeast
604 W. Chapel Hill Street
Durham, NC 27701
919-682-6374

Cooperating of
WIN MAGAZINE
326 Livingston Street
Brooklyn, NY 11217
212-624-8337

The War Resisters League National Committee voted to affirm the right for a woman to have a legal abortion and to support the right to economic assistance for an abortion or to have a child if the woman chooses. It was agreed to add to this motion, "the right to sex education, birth control information, and opposition to sterilization abuse." The NC also voted to affirm the right to all consenting individuals to complete sexual freedom.

--From the Minutes
WRL National Committee Meeting
March, 1981

On the basis of our above policy statement, the War Resisters League opposes passage of S158 •

WOMEN
AGAINST
PORNOGRAPHY

June 15, 1981

WOMEN AGAINST PORNOGRAPHY'S POSITION ON SENATE BILL 158

Women Against Pornography is a New York-based feminist organization working to educate the public as to the anti-female content of pornography and its effects on our lives. In a time when violent crimes against women and girls--rape, battering, sexual harrassment, and molestation--are on the rise, we must challenge the propaganda that sanctions these actions; we must confront the myths and messages perpetuated in pornography. This includes the message that women do not have a right to control their bodies, hence their lives.

This too is the message of Senate Bill 158. This bill poses a grave threat to reproductive rights. And, when women are not in control of their reproductive systems, they are not in control of their lives.

Without even addressing the possible unconstitutionality of Senate Bill 158, Women Against Pornography vehemently opposes any action that would in any way:

> subordinate women's bodies, health and even lives to fetal survival;
>
> prohibit or in any way interfere with a woman's right to choose an abortion; and
>
> endanger a woman's ability to obtain adequate health care.

The purpose of S-158 is to undermine the 1973 Supreme Court Decision protecting a woman's right to choose. However, sponsors and supporters of S-158 are deceiving themselves if they think passage of anti-abortion legislation will stop women from obtaining abortions. Should restrictions on abortion be enacted, we can expect the rates of death and complications from illegal and self-induced abortions to increase dramatically.

It is particulary noteworthy that since S-158 prohibits government funding and support for abortion the first victims of S-158 will be, as with the Hyde Amendment, poor and minority women. For example, the subsequent restrictions on Medicaid funded abortions, as prescribed in the Hyde Amendment, led to an increase in death due to illegal abortions.

Women Against Pornography does not believe that the supporters of S-158 are ignorant of these facts. Therefore, we can only conclude that they have unconscionably chosen to place the lives of all women in jeopardy. They have chosen not to view a woman as a "person" but have subjugated her to the role of a mere carrier of a fertilized egg.

We are here today to say that a woman is a "person"-- entitled to the fundamental right to control her own body.

WREE

June 10, 1981

Women for Racial and Economic Equality
Written Testimony in Opposition to S. 158

Women for Racial and Economic Equality (WREE) opposes any so-called "Human Life" legislation as a serious denial of civil liberties and rights guaranteed us by the Constitution of the United States.

Women for Racial and Economic Equality is a multi-racial, multi-ethnic national organization. We are Black, white, Chicano, Puerto Rican, Asian and Native American women. We are workers, trade unionists, unemployed, housewives, welfare recipients, professionals, students and senior citizens. We are women witnessing a daily deterioration of our living standards as the economic crisis in our country grows deeper.

The "Moral Majority" has forced the cutoff of federal funds for abortions to poor women, yet they continue to fund and even push the sterilization of over one million Americans a year! The "Moral Majority" carries on a false and fanatical crusade to brand as murderers all except the very wealthiest of women who can afford discreet abortions. Especially attacked are women who are driven to this "choice" by bitter economic need.

"Human Life" legislation would substitute the rights of a barely perceptible cell for those of all citizens, but particularly of the racially and economically opressed millions. It is ironic that the quality of life of the fetus would take precedence over the quality of life of women and their born children. While loudly proclaiming their reverence for life, the ultra-right funnels billions of our tax money into the military. The Reagan Administration's arms build-up is virtually on a war-time schedule, is inflationary and underlies the drive of big business, linked with the conservative right, to slash social services, including the right to abortion and related health services for all women.

Women for Racial and Economic Equality urges legislators to heed the voice of the majority of the American people. Support the democratic and economic rights due equally to all Americans, including the right to abortion and reproductive freedom.

WOMEN FOR RACIAL AND ECONOMIC EQUALITY
130 E. 16th Street, New York, N.Y. 10003 (212) 473-6111

WEAL

Women's Equity Action League
805 15th Street, N.W., Suite 822
Washington, D.C. 20005

(202) 638-4560

June 11, 1981

Senator John East, Chair
Subcommittee on Separation of Powers
Room 2226
Dirksen Building
Washington, DC 20510

Dear Senator East:

The Women's Equity Action League (WEAL) opposes S. 158 the alleged "Human Life" Bill.

Founded in 1968, WEAL is a national women's rights organization with members in every state, dedicated to the advancement of economic, educational, employment and legal rights for women. WEAL's membership is composed primarily of professional women working in the educational, legal, medical, business and government sectors.

WEAL asserts that this legislation is harmful not only to our members but to all women. It makes a statement of religious or moral belief and imposes it upon the entire citizenry of this country. Moreover, the bill violates a woman's constitutional right of privacy which includes controlling her repreductive activities; it mandates federal government intrusion into a very personal and private aspect of family life.

The legislative program as unanimously adopted by the WEAL membership at its May 3, 1981 Annual Meeting states:

> If equality between the sexes is to be achieved, every woman must have the right to control her reproduction to best suit her social, physical, economic, and emotional needs. In light of recent escalated attempts to remove this control from the individual woman and to empower the government to control her childbearing decisions, WEAL supports:
>
> - United States Supreme Court decisions which guarantee reproductive freedom to all women.
> - Continued federal and state funding of family planning programs and research aimed at finding safe, new methods of contraception.
> - Sex education programs in K-12 educational institutions throughout the United States.

- Access to voluntary sterilization with adequate safeguards to ensure that women and men are informed of the consequences prior to sterilization.

In addition, WEAL opposes:

- Any legislation which defines human life as beginning at the moment of conception.
- Any legislation which deems a fertilized egg to be a "person."
- Any constitutional amendment that threatens reproductive choice.
- Any attempts to intimidate or endanger the lives of staff or clients of family planning and abortion clinics.
- All local and state ordinances restricting the availability of abortion and family planning services.
- All involuntary sterilization.

WEAL reiterates its opposition to S. 158.

Sincerely,

Carol B. Grossman

Carol B. Grossman
National President

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
48 EAST 74th STREET NEW YORK, N.Y. 10021

April 14, 1981
10 Nisan 5741

Senator Orrin Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Hatch:

For Inclusion in the Hearing Record

Women's League for Conservative Judaism is the largest women's synagogue organization in the world, whose 200,000 members are the mainstream of Judaism in these United States. Below is a copy of our resolution on Abortion, adopted at our Biennial Convention in 1976.

Abortion

> Women's League for Conservative Judaism believes that freedom of choice is inherent in the civil rights of women. We also believe that the welfare of the mother must always be our primary concern.
>
> We therefore urge our Sisterhoods to oppose any legislative attempts through Constitutional amendments, the deprivation of Medicaid, family services and other current welfare services, to weaken the force of the Supreme Court's decision permitting abortions.

Although Judaism teaches certain constraints regarding abortion, we strongly believe that these belong to the private sector, and that the separation of Church and State are the best guarantee of religious liberty and civil rights for all.

In that light, Women's League for Conservative Judaism opposes any legislative measures to deny women the choice to make their own decisions.

We will continue to teach sensitivity to potential life in the synagogue, where it belongs.

Sincerely,

Mrs. Shlomo Balter
World Affairs Director

Mrs. Murry Kveller
National President

women
usa

76 Beaver Street. New York, N.Y. 10005. (212) 422-1492 / P.O. Box 8214. Washington, D.C. 20024.

Bella Abzug
President

Patsy Mink
Vice-President

Yvonne Burke
Treasurer

Gloria Steinem
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Brownie Ledbetter
Assistant Treasurer

Maggie Kuhn

JUNE 1, 1981

TO: Senator John East, Chairman, Senate Judiciary Subcommittee on Separation of Powers

FROM: Bella Abzug, President, WOMEN USA

STATEMENT ON HUMAN LIFE BILL, S. 158

WOMEN USA has requested an opportunity to testify before the Senate Judiciary Subcommittee on Separation of Powers during its hearings on S. 158. We regret that the hearings have been conducted in such a way as virtually to exclude representatives of women, the group most directly affected by the proposed legislation and the group most poorly represented in the composition of the U.S. Senate and House of Representatives.

WOMEN USA is a communications network and organization serving women throughout the United States, from women in small towns as well as cities, rural areas and every section of the nation. We strongly support reproductive freedom as a fundamental human right, as basic as freedom of speech and the press, and as important as the principle of separation of church and state, rights that are embedded in our U.S. Constitution.

The right of a woman to make free and informed decisions on childbirth, contraception, sterilization and abortion is part of a Constitutionally protected right to privacy that no arbitrary legislative act can be allowed to inhibit.

WOMEN USA opposes both a Constitutional amendment, which would seek to have the effect of outlawing the right to abortion, and the proposed statute, the Human Life Bill, S. 158, which has far-reaching implications that could jeopardize our Constitutional system of government.

The attempt to undermine our basic Constitutional processes by enacting a stattute requiring only a majority vote for adoption and declaring by legislative fiat that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception" should be rejected by the Senate Judiciary Committee and the U.S. Senate.

We believe that the statue exceeds Congressional authority, which is limited in the Constitution to enforcement of the 14th Amendment, and not its interpretation. It seeks to supersede the U.S. Supreme Court's definition of "person" as limited to those already born with one that defines the fertilized egg or fetus as a "person" on the basis of socalled "scientific evidence," which it does not and cannot substantiate, and by using such vague language as "a significant likelihood" as the basis for its finding that a fertilized egg is a "person" within the context of

(more)

the 14th amendment. This is poor science, poor logic and poor law. Moreover, the statute's denial of jurisdiction over any abortion to all Federal courts inferior to the U.S. Supreme Court represents a dangerous precedent that could unhinge our historic "checks and balances" system of democratic government and affect issues far beyond the immediate one of making illegal the right to abortion.

We agree with the Constitutional authorities who hold that Congress may not alter the courts' jurisdiction as a way of seeking to accomplish what it cannot do through enactment of substantive legislation.

Although the Senate subcommittee hearings are presumably confined to medical, constitutional and legal analysis of S. 158, we would remind you that what is involved are the rights, health, safety and futures of millions of women.

The real question in the abortion controversy is not when "human life" begins or whether women should be allowed to have abortions. It is whether they should be allowed safe, legal abortions. Before the U.S. Supreme Court decision of Jan. 22, 1973, most states had anti-abortion laws. During this period, an estimated one million women were having abortions each year, most of them illegally. Illegal abortions were reported to be the third largest source of criminal revenue, following only narcotics and gambling.

Each year, before the Supreme Court decision, physicians treated up to 350,000 women suffering from medical complications of unsafe, back alley abortions. Each year, it has been estimated, some 400 to 1,000 women died because they were denied access to legal abortions. Prohibiting abortion will not stop abortion. It will, instead, subject women to hazardous procedures that might jeopardize their health and lives and, in addition to this unnecessary trauma imposed on women during a time of great personal difficulty, the proposed legislation would seek to stigmatize them as murderers.

Even if some women would be prosecuted as murderers--an appalling concept, it is obvious that the nation's law enforcement capacities, already overstretched, could not begin to deal with the huge numbers of women who, as we know from past experience, would resort to illegal abortions. Thus, in enacting a law that could only be haphazardly or occasionally enforced, the Congress would be breeding contempt for the law, a suitable response to a law that exhibits contempt for women and their needs and rights.

By making the "rights" of the fertilized egg superior to the rights of women, who are without any question or controversy live human beings and persons, the authors of anti-abortion legislation, including S. 158, would demean and limit women to the role of breeders and incubators. By adopting "one theory of life," as the Supreme Court warned against, it would not only over-ride the rights of individual women but impose upon all Americans a view held only by a minority.

All national polls in recent years have shown that, by significant majorities, American women and men oppose legislation to make abortion illegal and believe this is a personal decision to be made by the pregnant woman herself. No woman can be forced to have an abortion if she finds it repugnant to her personal, religious or moral beliefs.

Let us remember Justice Oliver Wendell Holmes' wise statement that the U.S. Constitution "is made for people of fundamentally differing views," and not seek to upset the principle of separation of church and state and the respect for diversity that are the essence of American democracy.

Testimony of the National Board, YWCA
on S.158 for the
Senate Subcommittee on Separation of Powers

Since 1967, the YWCA of the U.S.A. has supported "the repeal of all laws restricting or prohibiting abortions when performed by duly licensed physicians." This position is supported by many of our members who would not themselves seek an abortion, but who are concerned to preserve for all citizens in our religiously pluralistic society the freedoms of privacy and conscience guaranteed to them by the Constitution.

The salient question, "When does personhood begin?" must remain in the religious and ethical realm, and should not be the subject of governmental intervention. The diverse opinions on this question held by many religious groups and by private individuals following the dictates of their own consciences must be respected.

Any attempt to enact into law one religious point of view constitutes an infringement upon the separation of church and state and threatens to destroy the fabric of mutual toleration of differing religious or conscientious views which was so fundamental a reason for our ancestors, fleeing from religious persecution in other countries, to insist upon a government allowing freedom of religion and conscience. S.158, the so-called Human Life bill, is clearly unconstitutional because it abridges these fundamental constitutional guarantees. We question whether Congress has the power to overrule the Supreme Court's interpretation of the 14th Amendment in the Roe v. Wade decision.

The YWCA of the U.S.A. has over 400 member YWCAs in every state in the Union, and approximately 2 1/2 million members. In every national Convention since 1967, our position on freedom of choice has been reaffirmed and strengthened by official delegates from every member Association.

Our overriding priority, the elimination of racism, makes us especially sensitive to the plight of poor women, disproportionately women of color, in our membership and our communities, who are denied Medicaid funding for abortions. This amounts to a denial of constitutional rights which may be exercised by more affluent women. Women may have valid and ethical reasons for seeking abortions. The government has no constitutional right to dictate their private decisions.

Helen R. Parolla, Director
Public Policy Center
National Board, YWCA
June 2, 1981

zero population growth

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Statement

By

Zero Population Growth

To

United States Senate

Committee on the Judiciary

Subcommittee on Separation of Powers

June 18, 1981

* * *

Mr. Chairman and members of the Subcommittee, Zero Population Growth welcomes this opportunity to present this statement to you today. Since its beginning, ZPG has called for an end to population growth in the United States and has unequivocally upheld the right to reproductive freedom. We are seriously concerned about the flurry of initiatives this year -- several Constitutional amendments, various legislative proposals, sharply reduced appropriations, and block grant funding -- which threaten to revoke, restrict, or hinder this right. The net effect of these initiatives, if successful, would be to add to the least desirable element of population growth -- children whose conception or birth was unwanted by one or both of their parents. For these measures, whatever their proclaimed intent, do nothing more than expressly deny, unreasonably limit, or unnecessarily obstruct the rights of individuals to determine the timing and size of their own families. To deny or curb rights to reproductive freedom will generate growth which is at once socially and ecologically unsound and, above all, encroach on individual liberties in ways contrary to both morality and legality.

Of all these proposals, none is more ill-conceived than the "human life statute" introduced by Senator Helms and Representative Hyde. By declaring that human life begins with conception, the statute endows the fetus with legal personality under the Fourteenth Amendment. Even its supporters are confused about just what they hope to achieve with their proposal. Most of them say the statute is designed only to prohibit the performance and funding of abortion by the states. But, others point out that by creating "a compelling state interest in the protection of unborn life," it would legitimize laws forbidding abortion, in any and all circumstances, should states choose to enact them. About all that is clear is that the statute would cause more problems than it would solve. Since the term "conception" is ambiguous, the statute might also license the prohibition of those methods of birth control which allow fertilization but thwart implantation. Moreover, Constitutional lawyers argue that Congress, by enacting the statute, might well overreach its authority. Whatever the intentions of its authors, the statute's effects -- indeed, its very Constitutional legitimacy -- will only be determined in the prolonged course of relentless litigation to which it will surely give rise.

The earlier hearings have confirmed ZPG's position. Medical and scientific witnesses appearing before your subcommittee have testified that the origins of human life pose questions beyond the reach of science. Likewise, legal and constitutional authorities have warned you that in seeking to define "person," the Human Life Statute represents an unwarranted and imprudent extension of Congress' constitutional authority and encroachment on the Court's Jurisdiction.

ZPG concurs with these authorities and deplores all attempts to reverse or circumvent the judgment reached by the Supreme Court in 1973. By holding a woman's independence in deciding to terminate her pregnancy in its early stages absolute, the Court's ruling on the Constitution is not liable to "new findings." And, if Congress were to define "person" in the sense of the statute, setting up conflicting Constitutional rights, the Court -- not the legislature, either federal or state -- must reconcile this conflict. Convinced that the Court has already justly and properly resolved this issue, ZPG considers the "human life statute" as well as the subcommittee hearings, unnecessary and inappropriate.

* * *

Zero Population Growth is a national, nonprofit, membership organization which advocates planning for an end to population growth in the U.S. and world wide.

* * *

PART 3.--RESPONSES OF MEDICAL DOCTORS TO SENATOR BAUCUS' LETTER

United States Senate
WASHINGTON, D.C. 20510

May 13, 1981

Dear Dr.

I am writing to you as the ranking minority member of the United States Senate Judiciary Committee SubCommittee on Separation of Powers. As you may know, the Subcommittee is conducting a series of hearings on S. 158. This legislation is designed to define human personhood as beginning at conception. The purpose of the legislation is to overturn the effect of the Supreme Court decision in Roe v. Wade. I am enclosing a copy of the bill for your review.

I am writing to you in your capacity as a medical expert. The Committee will be receiving testimony from medical and scientific experts who will evaluate the proposition that human life in the sense of an actual human being or legal person begins at conception. Some will maintain that current medical and scientific data can support the proposition; others will maintain that there is no new medical or scientific evidence which can support the finding in the legislation. I am interested in your evaluation of S. 158.

1.) Do you believe that the question of human personhood is a medical and scientific question?

2.) Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

3.) Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

4.) What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

I am anxious to receive your views on these complex and difficult questions. The Subcommittee will be considering these matters in the near future, and so a response by June 12 would be most helpful. I appreciate your assistance with this matter and look forward to hearing from you as soon as possible.

With best personal regards, I am

Sincerely,

Max Baucus

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers

Yale University

SCHOOL OF MEDICINE

333 Cedar Street
P.O. Box 3333
Department of Human Genetics
New Haven, Connecticut 06510

1981 MAY 18 AM 9:55

May 11, 1981

Senator Max Baucus
Senate Office Building
Washington, D.C. 02510

Dear Senator Baucus:

As a biologist of thirty-five years' standing, a professor of human genetics, and a member of the National Academy of Sciences, I wish to comment on Senate Bill S185, 1981, which you are currently considering.

S185 states that "Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception," and proposes that the term "person" be applied to "all human life" - thereby conferring personhood, with its protection under the fourteenth amendment, to the fertilized egg and all later stages in the development of the embryo.

There is absolutely no scientific basis for either the statement or the proposal. Let me explain, as briefly as possible, why this is so.

S185 deals with two separate issues, which were not always clearly distinquished at the hearings recently held by your subcommittee. They are:

(1) Is there a specific point in the reproductive cycle at which "human life" begins?
(2) Is there a specific point between conception and birth at which "personhood" begins?

(1) The beginning of "human life": To a biologist, "life" is an attribute of cells as well as of individuals. The unfertilized human egg and the human sperm cell are alive; so are the cells from which they descend and the fertilized egg to which their union gives rise. Indeed, all the cells in the body are alive, and - to the best of our knowledge - contain all of the genetic information needed to produce a human being.

That the unfertilized egg has such potential is dramatically demonstrated by recent experiments showing that a normal, adult mouse can be produced from an egg which has been incompletely fertilized, retaining only the maternal nucleus. This finding is extensible in principle to all mammals, including humankind, and shows that although complete fertilization is the normal trigger of embryonic development, it is not absolutely essential.

The only scientific answer to the question of when human life begins is that it began millions of years ago, and has been passed on by the germ line (sperm, egg, and their cellular antecedents) in an unbroken continuum to this day. It does not stop and start with each human generation, as implied by the statement "human life exists from conception".

(2) The beginning of "personhood": S185 would confer personhood on the fertilized egg; this proposal appears to be based on the realization that the fertilized egg is a live cell. As I have just pointed out, however, every cell in the body is alive and must be included in what S185 calls "all human life". Thus, if the fertilized egg is to be protected as a person under the fourteenth amendment, then so must every bit of tissue removed during surgery, every cell in the placenta, every egg that is shed at menstruation, and all the myriads of sperm that are produced but not used in the fertilization process. To call a cell a person clearly leads to an absurdity.

If, then, the newborn infant may be considered a person but not the fertilized egg, when does the transition take place? Science cannot provide an answer, since the process of embryological development is itself an unbroken continuum, and the stage at which personhood is considered to begin must be a matter of arbitrary definition.

A definition that places the beginning of personhood at the time that the unborn fetus could theoretically survive on its own, outside of the uterus, rather than at the time of actual birth, can easily be made on logical, practical grounds. To define personhood as beginning much earlier than that, however, could only be justified on religious grounds, which I understand are not a constitutionally acceptable basis for congressional legislation.

Thank you for letting me express my views of this subject. I would be pleased to testify before your committee, should you wish me to do so.

Sincerely yours,

Edward A. Adelberg

Edward A. Adelberg
Professor of Human Genetics

EAA:sp

cc: Senator John East

Joel J. Alpert, M.D.
Professor and Chairman
Department of Pediatrics
Boston University School of Medicine

Chief of Pediatrics
Boston City Hospital

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May 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

I am replying to your letter of May 13th, 1981 concerning hearings on Senate 158. The questions raised by Senate 158 are profound. The purpose of the legislation is to provide that human life shall be deemed to exist from conception but in actuality, as we are all aware, the purpose is to overturn the effect of the Supreme Court decision in Roe v. Wade. Therefore, while your specific questions are profound and difficult, I find myself unalterably opposed to Senate 158 as I believe that the choice of an abortion belongs to the individual woman.

With regard to your specific questions:

#1. Human personhood is a complex question and the answer does not come totally from medicine and science.

#2. It is in part a moral, ethical, philosophical, religious and political question.

#3. Medical and scientific data alone cannot determine what the definition of human personhood would be in the context in which it is being used.

#4. The impact of S. 158 if enacted would be devastating on medical practice because we would see a return to the pre- Roe v. Wade era with illegal abortions, interference with genetic screening, serious questions about the use of contraceptives, especially "the morning after pill".

Your letter clearly indicates your appreciation that these are very complex and difficult questions. S. 158 provides a simple doctrinaire answer. That perhaps is the best clue of all as to why it must be opposed.

Sincerely,

Joel J Alpert
Joel J. Alpert, M.D.
Professor and Chairman

JJA/ejc

University of Louisville
Health Sciences Center

School of Medicine
Children's Hospital
Department of Pediatrics

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Chairman (502) 588-5753

June 11, 1981

TO THE HONORABLE Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

The question of abortion is not a new one for the human race. Such giants of ancient Greece, Aristotle, and Hippocrates, took different sides of the issue. The father of modern scientific medicine, William Harvey, knew of the frequency of natural abortions, natural rejections in the first trimester of pregnancy, and studied the products; he felt life began with the pulsating of the heart. Others have stated that with quickening, fetal movements around the sixteenth week of gestation, life begins. In more recent times Avery and Mead have shown the importance of surfactant in the lungs at around twenty-four weeks of gestation which would make extrauterine life possible although not probable. The advances of neonatal medicine have made possible survival of infants even under one and a half pounds. A definition of life which I frequently quote to medical students is, "Life is to perceive and to be perceived, to feel and to be felt, to love and to be loved." In answer to your request are the following comments:

1. Human personhood is not totally a question of medicine and science.

2. The question of human person[illegible] is in part a moral, ethical, philosophical and religious question.

3. Medical and scientific data alone cannot determine the definition of human personhood. We can qualify life merely as the functioning of major body organs without mental function or of mental function of varying degrees as for other body organs. Can a physician say that a decerebrate human is not a person?

4. Should no abortions be allowed for patients receiving government payment for services and yet available for those who can afford the procedure? This would be unfair.

   Should no abortions be allowed period, conditions threatening mothers' lives may not be lessened or corrected.

   Should no abortions be allowed in the face of known genetic disease of fatal or horrendous outcome in a fetus, such would be born and of a hardship to the family, society and of great suffering to the infant.

> Should incest or rape be involved, an undesired birth could occur with all of the consequences thereof.
>
> Abortion as a tool to eliminate pregnancy is a failure of population or family control for which many measures are available. Yet when we speak of rights, does not the woman have rights, too, of her own mind and body?
>
> Why must we have to legislate the rights to have or not to have abortions. Many see medical, family and social (incest and rape) reasons for them. Children should be wanted, prepared for and kept and nurtured in the best manner possible.

I personally feel that abortion is an individual problem and that there is no necessity to legally condemn nor endorse it. We are what we are because of our religion and other training and our total being is involved in such important decisions. This country was established upon the grounds of religious freedom. The responsibility of our law-makers is to preserve this freedom. The writer of the Unanimous Declaration and the Statutes of Religious Freedom of the Commonwealth of Virginia, Thomas Jefferson, stayed clear of religious differences or the imposition thereof upon citizens of this country and his state.

Children do have rights and the fetus also has rights. The Roe vs. Wade decision gave rights to the unborn fetus at a time when life or sustenance of life under atmospheric conditions outside the womb was possible. In future years should society so wish and science progress, an earlier time will be placed for possible survival. Under the conditions of the time, and with the level of medical knowledge, the momentous decision of the Supreme Court was not a bad one. The use of funds for any procedure can be determined by the grantor, Federal or others. "He who pays the piper calls the tune." Government in its granting capacity should assure that no discrimination occurs in the utilization of its funds.

We are proud of the newly gained rights of infants and children. We should place our national efforts upon areas which will give them a more hopeful and productive future for the opportunity of "Life, liberty, and the pursuit of happiness". The level of achievement of any civilization will be determined by the attention it has paid to the welfare of its infants and children. Direct your attention to securing the best health care, education and opportunities possible for those to be or being born today and we shall have a better and more responsible society in the tomorrows.

Thanking you for your request for my views, I am

Sincerely yours,

Billy F. Andrews

Billy F. Andrews, M.D., F.A.A.P., F.A.C.P.
Professor and Chairman
Department of Pediatrics

BFA:jk

EASTERN VIRGINIA MEDICAL SCHOOL
DEPARTMENT OF OBSTETRICS AND GYNECOLOGY
603 MEDICAL TOWER
NORFOLK, VIRGINIA 23507
TELEPHONE (804) 628-3601

May 31, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Re: Senate Bill S.158

Dear Senator Baucus:

This responds to your letter to Robert M. McCombs, Ph.D., Executive Dean, Eastern Virginia Medical School, who has asked me to respond.

I can respond more authoritatively to question #4 of your letter concerning the impact of the legislation. It would:

(1) Eliminate the almost universally accepted long-standing opportunity for a physician, under the scrutiny of peer review, to terminate an early pregnancy, the consummation of which was judged responsibly to threaten the life of the mother.

(2) It would terminate the widely, but not universally, accepted option for the patient carrying an early pregnancy, reliably predicted to produce a seriously abnormal child, to elect to have this pregnancy terminated before viability.

(3) It would make it illegal for a physician treating a patient whose pregnancy was hydatidiform mole to treat her according to known medical practice which would best protect her life and health. It would deprive her of this reasonable right and expectation for the inexplicable reason of having had this grape-life mass of tissue which is not human by any stretch of the imagination declared human by leaders of our Nation. The logical consequence of such an indefensible act would question the very soundness of our legislative process.

(4) It would subject to criminal prosecution the millions of patients who have elected to use the intrauterine device as a means of contraception. I am sure it is understood that this is one of the most reliable and important methods of family planning. Any withdrawal of effective family planning methods will cause a certain number of unnecessary maternal deaths because pregnancy carries a mortality whether wanted or unwanted.

(5) It would subject to criminal prosecution any physician who installs an intrauterine device and possibly any physician who has already installed such a device.

To move on to the other major consequences of this definition, although they would, in my view, result in literally thousands of unnecessary deaths and many cases of harmful preventable damage to person and family, draws into the arena arguments which become more personal and subjective and must be respected. I submit that the above points should be sufficient to seek some other avenue to circumvent the interpretation of our Constitution as rendered by the Supreme Court.

Sincerely,

Mason C. Andrews, M.D.
Professor and Chairman
Department of Obstetrics
and Gynecology

cc: Robert M. McCombs, Ph.D.
Executive Dean
Eastern Virginia Medical School

MCA:dlj

3181 S.W. Sam Jackson Park Road
Portland, Oregon 97201
June 1, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I'm replying to your letter of May 13, 1981. I must emphasize that I am speaking entirely for myself as an individual and do not represent any institutional point of view. To answer your questions specifically:

1. Do you believe that the question of human personhood is a medical and scientific question? No.

2. Is it your view that the question of human personhood is part of a moral, ethical, philosophical, religious or political question? Yes.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? No.

4. What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; others?

   Obviously, it would have a profound effect on genetic screening, the practice of medicine, and the psychic and political climate of the United States. I would certainly advocate caution before enacting legislation which would have such sweeping effects, many of which might well be deleterious and a number of which would be unforseeable.

Sincerely,

Ransom J. Arthur

Ransom J. Arthur, M.D.

RJA:ms

AMERICAN COLLEGE OF NURSE-MIDWIVES
1522 K Street, N.W., Suite 1120, Washington, D. C. 20005 202/347-5445

1981 AUG 20 AM 8: 14

August 10, 1981

The Honorable Max Baucus
1107 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus:

The American College of Nurse-Midwives, an organization of providers of health care to women and infants, is concerned with the quality of services available to women making reproductive decisions. In conjunction with our philosophy which affirms the right of women to health care services which meet their individual physical and emotional needs, we have developed the enclosed statement. We offer this position statement for your consideration during your deliberations on the legislation which affects the legal status of abortion services.

The following is a resolution drafted by the Board of Directors at the request of the voting members present at the 26th Annual Meeting of the American College of Nurse-Midwives, April, 1981, Denver, Colorado.

> "The American College of Nurse-Midwives reaffirms its basic philosophy of health care for women and childbearing families for safe, satisfying experiences with respect for human dignity and worth; for variety in cultural forms and for individuals' right to reproductive self-determination."

Sincerely,

Sally Tom

Sally Austen Tom, CNM, MS
Government Liaison

SAT/sdt

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June 9, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you very much for writing to me concerning S-158.

I do not consider myself an expert in anything; however, I will try to answer your questions.

1. I do not believe that the question of human personhood is a medical or scientific question. Life and living are scientific questions, but this includes an isolated cell, which is metabolizing. This I consider life, but this is far different from personhood.

2. I believe that human personhood is a moral, ethical, philosophical, religious and political question (politics being in the best sense of the word).

3. I think it is absolutely impossible that medical and scientific data can determine human personhood in the present context. This is especially important in view of S-158.

4. I am afraid that if S-158 is enacted, we will be back to many of the evils of the previous era. I think there is a legalistic concept that is overlooked by this. What is the significance of the fact that a condemned person should be evaluated by a jury of his peers?

We do not do any genetic screening prenatally on any patient who would not consider abortion. Therefore, at least from our standpoint, genetic screening prenatally would be stopped. I think that the practice of medicine would suffer and that abortion laws will again be established. I think that the rich will continue to have all the abortions they want, whereas the poor will get the contaminated ones.

One final question: If personhood begins at conception, does this mean that we are all nine months older? Do we have to change our birth certificates? What will happen to the social security system if we should suddenly get a new mass of people 65 years old?

I write all of this in the full realization that without abortions my profession would thrive even more. Nonetheless, I feel it more important to allow pregnant women to make their own decisions.

Sincerely yours,

Lew Barness

Lewis A. Barness, M.D.
Professor and Chairman

LAB:nw

Samuel J. Bass, M.D., P.A.
2233 LEE ROAD
WINTER PARK, FLORIDA 32789
TELEPHONE 305 - 628-1055
FELLOW AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGY

1981 MAY 18 [illegible] 05

May 14, 1981

The Honorable Max Baucus
Room 1107
Dirksen Senate Office Building
Washington, DC 20510

Re: Senate Bill #158 - Request to speak to before Congressional Hearings

Dear Senator Baucus:

I wish to testify regarding medical and sociological aspects of the inception of life. My views may provide acceptable grounds for resolution of the controversy by both pro-choice and anti-choice factions.

Of paramount importance, human life must be qualified and defined as meaningful human life, medically and sociologically that begins at approximately 28-32 weeks of gestation. The premise is based upon scientific recognition of capability of the brain to function. Philosophically, the significance of this criterion is highlighted by the classical evaluation of existence by Renee Descartes who summarized his meditations with the conclusion, "I think, therefore I am."

From a practical standpoint, this criterion of meaningful existence would retain validity with the prohibition of abortion past twenty weeks of gestation, the halfway point of a full-term pregnancy. Therein would be built a significant safety buffer of time. It is also significant that most states have already chosen the twenty week mark to differentiate means of disposal of products of pregnancy from either induced or spontaneous abortion. Before twenty weeks, those products are considered surgical specimens. After that time, a funeral may be required.

Permit me to offer an additional consideration. In trying to define the existence of life, more properly meaningful human life, Congress has called upon representatives of science and disciplines based upon opinion, be they religious, philosophical, or moralistic. Therefore, the sanctity of the first and fourteenth amendments have come to be at stake. The governments' endorsing any one moral/religious viewpoint to the exclusion of all others amounts to establishing the chilling nucleus of a state religion. I suggest that such a catastrophic turn could and should be avoided with exclusion from any passed legislation of those persons stating openly that the dictates of their personal, moral or religious codesdoes not recognize meaningful human existence until at least twenty weeks of gestation.

Although there is a multitude of additional factors which may merit serious consideration, I feel that the three subjects touched upon in this presentation embody constructive answers to the question at hand and offer a satisfactory meeting ground of resolution. Your assistance in my presenting these thoughts will be greatly appreciated.

Sincerely,

Samuel J Barr MD

Samuel J. Barr, M.D.

SJB:lm

Enclosure: "A Woman's Choice"

CASE WESTERN RESERVE UNIVERSITY · CLEVELAND, OHIO 44106

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

I am writing to reply to your inquiry of May 13 (received May 26) concerning my evaluation of S. 158.

1. I do not believe the question of human personhood is a medical and scientific question.
2. I believe the question of human personhood is, in part, a moral, ethical, philosophical, religious or political question.
3. I do not believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context.
4. In my judgment, if S. 158 is enacted it will a) interfere with medical practice because of the threat that physicians who recommend and carry out medically indicated abortions will be subject to prosecution, b) decrease genetic screening since one important reason for such screening is to identify fetal abnormalities in time to take preventitive measures to interrupt pregnancy, and c) will discourage use of contraceptives since some of the best contraceptive approaches probably act after conception (fertilization of an egg by the sperm) has occurred.

Please let me know if there is any way I can be of further help in discussion of this important issue.

Sincerely yours,

Richard E. Behrman

Richard E. Behrman, M. D.
Dean

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UAB
The University of Alabama in Birmingham
Department of Pediatrics/Office of the Chairman
205/934-4974

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to respond to the questions in the Subcommittee regarding S. 158. My response to the four questions are as follows:

1) It is obvious that the exact moment that one cell replicating may become a person is a most difficult question. Perhaps it is a question that should be answered most clearly by the individual in whose body the particular cell might choose to replicate and ultimately produce a fetus. Does it begin when cells replicate or does it begin when a structure of complex organs becomes a new individual capable of sustained life without a parent, or more specifically, being totally nurtured by the mother? In my judgement it is not possible to clearly define, by scientific terms, that point at which life truly begins.

2) The question of human personhood is indeed a moral, ethical, philosophical, religious and unfortunately, a political question. As many deep questions that concern mankind, perhaps we will never have an all-inclusive answer to these descriptive terms. Although words such as human personhood lack specificity, if interpreted in the narrow context of many political and religious groups such words have very specific meaning which is not justified by the total body of data. This is unfortunate for many individuals in our society.

3) There are few questions for which medical and scientific data alone can determine a definition about persons or about personhood. Medicine as a scientific discipline is almost by definition a changing arena. Facts are only facts until they have been disproven and our understanding is extended beyond its current limits. By so doing we abandon many current ideas and proceed to a new level of understanding.

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4) Senate bill 158, as I understand it, would be a dramatic change in the very fiber and social structure of this country. It is difficult for me to believe that an individual's freedom should be given up and removed on a legislative basis. I strongly believe that those individuals who have beliefs about contraception and preservation of intrauterine life should be allowed to maintain those views. At the same time, I see no basis on which one segment of our society, perhaps even a minority segment of our society, should be able to impose its will on the entire population. The ability to make individual choices about protection from pregnancy, and the maintenance or not maintaining intrauterine life in the early stages of pregnancy would seem best left to the individual. Obviously, in the later stages of pregnancy and in all children that are liveborn, the issue is much more succinct and clear, and life should be protected as best we can protect it.

I appreciate you allowing me to express my views on the subject.

Sincerely,

John W. Benton

John W. Benton, M.D.
Professor and Chairman

JWB/cac

These represent my personal and professional views but not necessarily those of the University of Alabama in Birmingham.

OBSTETRICS & GYNECOLOGIC
SURGERY

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TELEPHONE 388-4845

1981 MAY 11 AM 10:20

May 5, 1981

Senator Max Baucus
United States Senate
Washington, D.C.

Dear Sen. Baucus;

As a resident in the State of Colorado, I feel I must voice my concern about recent hearings in Congress. The particular concern is the definition of life in regards to the fertilized ovum.

Since the Supreme Court of the United States was unable to answer the question when life begins; and medical science is unable to answer the same, I have great concern as to the Congress of the United States making the decision. I feel the philosophical question cannot be answered, thereby no protection is granted to the fertilized ovum under the 14th Amendment.

The advocates of pro life continue to force their beliefs "down the throats" of citizens that feel an individual decision must be paramont. The right to decide and choose as an individual needs to be protected.

I hope that as a practicing Obstetrician-Gynecologist and one who has seen the effects of abortions performed illegally, Congress again will not subject women to this terrible physical assault. The legalizing of abortion in 1972, the right for one to decide individually, has practically halted the criminal procedures we have seen.

I would like very much to see Congress defeat any attempt again to humiliate and destroy lives of innocent women.

Sincerely yours,

Mark P Berland DO

Mark P. Berland, D.O.

MPB/jkg

Yale University *New Haven, Connecticut 06510*

SCHOOL OF MEDICINE
333 Cedar Street
Office of the Dean

April 23, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am happy to have this opportunity to respond to your question concerning the proposition that human personhood begins at conception. It is not my usual practice to state my qualifications to comment but I would like to establish that my credentials as a medical and scientific expert do not derive only from my current position as Dean of the Yale University School of Medicine. Before coming to Yale I served in several positions in the intramural program of the National Institutes of Health, including the Scientific Directorship of the National Heart Institute for some 14 years. At the time I resigned from NIH I had been for some 5 years the Deputy Director for Science of the NIH. I have served on the editorial boards of a number of scientific journals and as the President of The American Society of Clinical Investigation, The American Physiological Society, The American Society of Nephrology and The Society for Experimental Biology and Medicine. I am a member of the National Academy of Sciences, currently serving as a member of the Academy's Council, the Institute of Medicine (of the NAS), and the American Academy of Arts and Sciences.

To turn to the questions that you have addressed to me, I would state that science can not provide an answer to the question of when human personhood begins. The concept of human personhood is a philosophical, indeed a religious, construct that is not susceptible to scientific or technical identification. Consequently, Section 1 of Chapter 101 of S.158 is simply incorrect in stating "that present day scientific evidence indicates a significant likelihood that actual human life exists from conception". There is no scientific evidence that bears on this question, nor can there be in the forseeable future; science can not provide a statement on this issue.

Obviously, given the many necessary accessory conditions including the maternal environment, the fertilized ovum has the potentiality to develop into a complete human individual. But to ask science to specify the point at which that developing organism becomes a human person is to ask a question beyond the domain of science. A man of religion may be willing to provide what is, in his philosophy, an answer. A man of science, in his role as scientist, can not.

Sincerely,

Robert W Berliner

Robert W. Berliner, M.D.
Dean

RWB/m

HARVARD MEDICAL SCHOOL
LABORATORY OF HUMAN REPRODUCTION AND REPRODUCTIVE BIOLOGY

JOHN D. BIGGERS, D.Sc., Ph.D.
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45 Shattuck Street
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May 4, 1981

The Honorable Max Baucus
Senator, Montana
United States Senate
Washington, D.C. 20510

Dear Sir:

Thank you for your letter of April 16, 1981, inviting me to comment on the assertion that current medical and scientific data supports the proposition that human life in the sense of an actual human being or legal person begins at conception. I was unable to respond earlier as your letter was incorrectly addressed, and it took 10 days before it reached me. I am honored by the invitation.

In my opinion to ask when human life begins is an ill-conceived question which by its very nature cannot be answered. The reason scientists give different answers is not because there is scientific dispute but because they do not recognize the fallacy of asking the question. The reason there cannot be a beginning is because the human life cycle is a continuous process in which life flows from one generation to the next. There are two phases of human life; one phase is the diploid phase, represented by all individuals produced by the process of fertilization, and the other phase is the haploid phase, represented by individual genetically unique spermatozoa and secondary oocytes. Fertilization, together with a process called meiosis, are processes that lead alternatively from haploid-diploid-haploid-diploid in endless succession in the continuum of life. Thus the beginning of life cannot be defined.

The word person is a common noun which is a name that can be applied in the same sense to any one of an indefinite number of human individuals with a common property. It is a colloquial word which traditionally applies to men, women, boys and girls after birth. The suffix hood, which also means person, is applied to these words. Thus boyhood, which literally means boyperson, has come to mean the state of being a boy. Similar considerations apply to girlhood, manhood and womanhood. I am not sure what personhood, being used nowadays with increasing frequency, is meant to convey. It is not listed in Webster's Dictionary, nor the Oxford English Dictionary. Literally, personhood means person-person, which I cannot understand. If it means the state of being a person, it implies that there is a wider class of individuals of which persons are a subclass. This then takes us back to how we define the word person. Personally I feel person is used only as a device for economizing in words. It sould therefore be arbitrarily defined to achieve a purpose as in S. 158.

I believe that discussion of when life begins is a futile exercise and that discussion of the meaning of person is not a very productive activity. Both debates are obscuring the real issues:

(1) What will be the implications of enacting S. 158 if the States have to interpret the word conception.

(2) What are the reasons for wanting to outlaw abortion, and what is the motivation of those who are so strongly opposed to it.

I am enclosing a short paper I have written that demonstrates the serious ambiguities of the word conception, and how two current usages could lead to very different state laws. I hope you find it useful.

I am drafting another short paper which I will send you in a few days which deals with the second question.

With kind regards,

John D. Biggers

John D. Biggers, D.Sc., Ph.D.
Professor of Physiology

JDB:bl

Enclosure

AMBIGUITY OF THE WORD CONCEPTION: IMPLICATIONS IF BILL S. 158 IS ENACTED

John D. Biggers, D.Sc., Ph.D.
Professor of Physiology

Harvard Medical School
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and Reproductive Biology
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Boston, Massachusetts 02115

INTRODUCTION

Bill S. 158, now before the U.S. Senate would provide that "Human life shall be deemed to exist from conception." By defining the word *person* to include all human individuals from conception, the fourteenth amendment to the U.S. Constitution would then apply to all these persons. This would require all States to protect the life of these persons under the law. The effect of the Bill would be to permit the States to enact laws prohibiting abortion in the name of protecting the unborn.

Should S. 158 be enacted the States would have to interpret the word *conception*, since it determines the extent of human individuals that would be protected. It is therefore critical that we examine the meaning of the word conception.

DEFINITION OF FERTILIZATION, ZYGOTE AND IMPLANTATION

FERTILIZATION is a noun denoting the process that results in the production of a single cell by the fusion of a single-celled spermatozoa with a single-celled ovum.

ZYGOTE is a noun denoting the single cell produced by the process of fertilization.

Fertilization occurs in the ampullary region of the oviduct, which is part of a woman's genital tract. The zygote soon begins to undergo a succession of cell divisions, beginning the preimplantation phase of development. Concurrently it travels along the oviduct to the uterus. From the 15 human preimplantation embryos that have been observed over the past 40 years by investigators in several parts of the world, it seems that the preimplantation embryo enters the uterus about three days after fertilization and consists of about 16 cells[1]. During the next three days the embryo remains suspended in the fluids within the uterus, and concurrently continues development to the blastocyst stage. Approximately six days after fertilization the blastocyst invades the lining epithelium of the uterus and enters the underlying maternal tissues. Eventually the embryo leaves the uterine cavity completely and becomes located in the mother's tissues where it continues development. This process of invasion is called *IMPLANTATION*.

ETYMOLOGY OF CONCEPTION

Conception is a colloquial noun, that originated in medieval English and has acquired many meanings. Let us look at its usage prior to the discovery of the essential features of fertilization which were discovered between the years 1875 and 1879. The usages are listed in Noah Webster's "An American Dictionary of the English Language", published in 1828. They are:

(1) "The act of conceiving."

This can mean either the act of having a fetus formed in the womb or the act of becoming pregnant.

(2) "The first formation of the embryo or fetus."

Prior to the discovery of fertilization, this usage referred to some event not understood which marked the origin of the fetus.

The concepts expressed in both of these definitions are very different, and they separately form the basis of the two current usages of the word *conception* in the biomedical literature. It is for this reason that the preamble to S. 158 is seriously ambiguous.

After the discovery of fertilization, and the introduction of the word *zygote* in 1891, a more precise version of meaning (2) was introduced. Thus the third abridged edition of Webster's Dictionary (1966) adds the following definition:

(3) "The formation of a viable zygote."

This can mean either the zygote that is formed or the act of forming a zygote. I believe the word viable adds nothing to the definition and that it can be ignored. If the drafters of S. 158 are using the word *conception* as defined in Webster's Dictionary, it clearly refers to the zygote, the product of fertilization. This is a widespread usage among many developmental and reproductive biologists. As a former editor-in-chief of the official journal of the Society for the Study of Reproduction, Biology of Reproduction, I was fully familiar with this usage.

The other meaning of the word *conception* is based on the concepts expressed in meaning (1) -- the act of becoming pregnant, which is a physiological rather than a developmental one. To understand this notion, we need to consider the neuroendocrine system of the mother. This system can function in two ways: one way is where it cycles about every 28 days and regulates the time of ovulation and the time of menstruation. The other way is a non-cycling pattern associated with pregnancy. The switch from the first to the second pattern is brought about by a chemical signal originating in the blastocyst at about the time of implantation. Thus prior to implantation a woman is physiologically unaware an embryo is present and is functioning as though she is non-pregnant. It should be emphasized that the physiological awareness of the presence of an embryo does not correspond with natural conscious awareness of pregnancy. This is usually noticed when menstrual cycles cease.

In a lecture given in 1959, Dr. Bengt Böving, now Professor of Anatomy, Wayne State School of Medicine, Detroit, suggested that the word *conception* should refer to the act of becoming pregnant, thus associating conception with the process of implantation[2]. Subsequently, in 1965, the Committee on Terminology of The American College of Obstetricians and Gynecologists adopted the definition[3]:

(4) "Conception is the implantation of a fertilized ovum."

This is an unfortunate definition since it is not the zygote that implants but the blastocyst. Later in 1972 the Committee on Terminology changed the definition to read[4]:

(5) "Conception is the implantation of the blastocyst. It is not synonymous with fertilization."

The reason the American College of Obstetricians and Gynecologists adopted this definition seems to be related to the fact that the earliest pregnancy can be detected by pregnancy tests is towards the final phases of implantation. Pregnancy tests involve the detection of the presence of the chemical signal from the blastocyst in the maternal blood. Modern tests are almost 100 percent reliable about 12 days after the formation of the zygote. There are difficulties with the exact meaning to be attached to the 1972 definition (5) because the meaning of conception is defined in terms of a process, so that to use the word with precision an arbitrary stage of the process has to be identified.

In view of the ambiguity of the word *conception*, I believe its use in the biomedical literature be discouraged. The word is not needed since more precise words are available. Dr. Böving was prophetic when he wrote[2]:

"*CONCEPTION* may be traced to the Latin root, *capio*: 'grasp, take hold, receive into the body', and is certainly no less applicable to the uterine reception of the ovum than to the ovular reception of the spermatozoon. Whether eventual control of implantation may be reserved the social advantage of being considered to prevent conception rather than to destroy an established pregnancy could depend on something so simple as a prudent habit of speech."

If S. 158 is passed many different State laws could presumably be enacted. If a State law were passed that adopted the definition of conception given by Webster's Dictionary (3), any procedure that might lead to the destruction of a preimplantation embryo would be outlawed. This could affect some of the most effective types of contraception -- some types of oral pill, the IUD, and the development of "morning after" pills. The treatment of a rape victim during the preimplantation period would br outlawed, and *in vitro* fertilization and embryo transfer for the treatment of a common, very intractable cause of infertility would be prohibited. A law that applied from the formation of the zygote could imply that a woman is responsible for a preimplantation embryo she cannot possibly know is present, and hold her responsible for any damage to a child from activities or medications taken during the preimplantation phase. Should she therefore always assume she may be pregnant and adjust her behavior accordingly? What this behavior should be is obscure. In contrast, if a State law were passed that adopted the definition of conception as defined by the American College of Obstetricians and Gynecologists (5) all of the activities I outlined above would be allowed. The States that adopted definition (3) would not achieve their objectives since women could obtain the services they want by crossing state lines. It seems to me personally that to set up the possibility of such heterogeneity between the State laws is Machiavellian. It would be legal for the manufacture and distribution, for example, of intrauterine devices and morring-after pills in one state while their distribution and use would be illegal in another state, creating conditions for a blackmarket in contraceptive devices in a state where their use is illegal, a perfect set up for racketeering.

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4. Hughes, E.C. Gametogenesis and Fertilization, in Obstetric-Gynecologic Terminology. Philadelphia: Davis, 1972: 299-304.

CREDENTIALS

John D. Biggers, D.Sc., Ph.D.

Professor of Physiology, Harvard Medical School, and Member of the Laboratory of Human Reproduction and Reproductive Biology.

Doctor of Philosophy in Physiology, University of London, 1952

Doctor of Science for distinguished contributions to Science, University of London, 1965

Former Commonwealth Fellow, St. Johns College, University of Cambridge

Former President of the Society for the Study of Reproduction

Former Editor-in-chief, Biology of Reproduction

Honored by an invitation to give the Upjohn Lecture to the American Fertility Society, 1973

Former Member of the Reproductive Biology Study Section, National Institutes of Health, 1968-1972

Former Member of the World Health Organization Human Reproduction Program Task Force on Implantation

Consultant to the Ford Foundation and World Health Organization

Scientific consultant to the Ethics Advisory Board, U.S. Department of Health, Education and Welfare on in vitro fertilization and embryo transfer

Author and co-author of 145 scientific papers, most in the area of reproductive biology

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May 11, 1981

The Honorable Max Baucus
Senator, Montana
United States Senate
Washington, D.C. 20510

Dear Sir:

I am responding further to your letter of April 16, 1981, requesting answers to the following questions:

(1) Does an actual human being or legal person begin at conception?

(2) Do I believe that the question of human personhood is a medical and scientific question?

(3) Is it my view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

(4) Would I agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context?

After reflection I finally wrote the enclosed paper in which you will find my answers to the complex issues raised by these questions. I hope you find them helpful.

Sincerely,

John D. Biggers bl
John D. Biggers, D.Sc., Ph.D.
Professor of Physiology

JDB:bl

Enclosure

SOUND AN ALARM: RAMIFICATIONS OF THE ATTEMPTS TO OUTLAW ABORTION

John D. Biggers, D.Sc., Ph.D.

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INTRODUCTION

Recently considerable effort has been initiated in the U.S. Congress to outlaw abortion[1]. Several bills have been introduced in the Senate and House of Representatives, such as the Human Life Statute, Right to Life Act of 1981, Funding Proscription Act and several measures to limit the Federal Courts' jurisdiction. This essay has been stimulated by reflections about the Human Life Statute (S. 158, HR 900), the Right to Life Act of 1981 (H.R. 3225) and the Report of the Special Human Life Amendment Committee of the National Right to Life Movement printed in full in National Right to Life News[2].

The preamble to S. 158 reads:

> "To provide that human life shall be deemed to exist from conception."

The preamble to H.R. 3225 reads:

> "To provide that in respect to the right to life, human beings shall be deemed to exist from conception, to provide for the enforcement of the fourteenth amendment, and until such time as an amendment to the Constitution of the United States protecting the right to life is adopted, to provide for the protection of unborn persons under the law."

Three provisions of an amendment to the U.S. Constitution recently adopted unanimously by the Human Life Amendment Committee read:

> "Section 1. The right to life is the paramount and most fundamental right of a person."
>
> "Section 2. With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendment to the Constitution, the word "person" applies to all human

> beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization."
>
> "Section 4. Congress and the several states shall have power to enforce this article by appropriate legislation."

Section 3 is still not agreed on for there are majority and minority versions:

> "Section 3 (Majority): No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of a pregnant woman; but this law must require every reasonable effort be made to preserve the life and health of the unborn child."
>
> "Section 3 (Minority): The right to life of an unborn person is protected by the Constitution against infringement by any person."

The strategy of both S. 158, H.R. 3225 and the amendment to the U.S. Constitution is to ensure that the fourteenth amendment applies to all human beings from the time of conception or the beginning of fertilization. This is done by defining the word person to denote all human beings from conception or the beginning of fertilization. The effect would be to enforce the States to protect all human beings including the unborn.

On 23 and 26 April, 1981, hearings were held before the Senate Subcommittee on the Separation of Powers about when life begins. These hearings were meant to examine the first finding of the Bill (p. 1, lines 6-8) that:

> "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception."

A biologist must surely find this a strange statement. Curiously the corresponding finding in H.R. 3225 (p. 2, lines 8-9) begins with the positive assertion:

> "Present day scientific evidence indicates that a human being exists from conception."

Another debate that has not yet reached any hearings is the meaning of the word person.

I will argue in this paper that these are fruitless debates that obscure the real issues.

HUMAN LIFE CYCLE[4,5]

The notion that all biological life is continuous goes back to Weissman[6] who in 1891 proposed his theory of the continuity of the germ plasm. Thus to quote the words of the late Edmund Wilson of Columbia University[7], one of America's great biologists: "In the highest animals the life-cycle is a strictly sexual one which may be said to begin and end with the egg or sperm." Life, in fact, passes on without interruption in an unbroken cycle from generation to generation. Thus the human life cycle is renewed by the fusion of a sperm and ovum which initiates development and growth controlled by a new sample of the gene pool. The phase of maturity is eventually entered and this is terminated by death. During the period of maturity an individual may participate in the process of reproduction by the production of spermatogonia or ova. These cells each have a life of their own. It is by the fusion of one sperm with one ovum that the human life cycle is renewed. We can now define the words fertilization and zygote:

> Fertilization is a noun denoting the process that results in the production of a single cell by the fusion of a single-celled sperm with a single-celled ovum.
>
> Zygote is a noun denoting the single cell produced by the process of fertilization.

Biologists separate the life cycle of sexually reproducing organisms into two phases called the diploid and haploid phases, respectively. The transition from the haploid to diploid phase occurs as the result of fertilization, and the transition from the diploid to the haploid phase occurs as the result of the process called meiosis. Two very important processes called chromosome recombination and crossing-over occur during meiosis. The combined result of chromosome recombination and crossing-over is the production of haploid human individuals represented by the spermatozoa and ova. Diploid human individuals are produced by fertilization and are represented by male and females from the zygote stage to maturity. All human individuals, haploid and diploid are likely to be genetically unique at a level of probability nearing certainty. Moreover, they are all live representatives of the human species.

The discussion so far has not considered the question of pregnancy. In fact, the concepts of the life cycle and continuity of life, and the definitions of meiosis, fertilization and the zygote, apply completely for example to frogs that shed their eggs and sperm into pond water where fertilization occurs and the zygotes develop into tadpoles and adults without any further participation of the parent males and females.

In a large number of organisms, for example sharks and human beings, fertilization followed by a period of development occurs within the body of the female. This period is terminated by the process of birth. In women the early embryo spends three days travelling down the oviduct to the uterus. For the next three days the embryo is suspended in the fluid in the uterus during which time it develops into a blastocyst. The blastocyst then invades the lining epithelium of the uterus and enters the underlying maternal tissues. Eventually it leaves the uterine cavity completely and enters the mother's tissues where it continues to develop. This process of invasion is called implantation. Thereafter the organs develop during the embryonic period, and this is followed by a period of growth and tissue differentiation during the fetal period. The fetal period is terminated by the process of birth (parturition). From birth onwards a physiologically separate human individual exists, but already special cells have been set aside in the testes or ovary of the newborn which will be the parents of the next haploid phase of the human life cycle.

Thus the life cycle is a process that is alternately represented by diploid and haploid phases. As a primary classification we can speak of diploid and haploid individuals. We also use common nouns to denote any one of a class of similar human individuals that exist at different times in the life cycle--for example, man, woman, boy, girl, fetus, embryo, zygote, spermatozoon, oocyte. When each of these classes come into existence depends on identifying.a specific stage of the life cycle which sometimes are only vaguely defined.

SOURCES OF CONFUSION ABOUT HUMAN LIFE

That life in a biological sense, has a beginning.

To ask when life begins in the continuum of life poses a question to which there can be no answer. It is therefore foolish to suggest it begins with a particular state, for example the zygote, or in terms of physiological phenomena such as when the heart first beats, when brain function appears, quickening or viability. Individual scientists, who do not appreciate the importance of the life cycle, will produce different answers that are based on pragmatic or metaphysical reasons. Thus taking a popular vote of a group of scientists and physicians at hearings like those held on 23 and 24 April, 1981, can be given little weight, for they are being asked to answer a scientifically ill-conceived question.

That the Fertilized Egg is a Complete Human Being

Senator Helms in introducing S. 158 on the floor of the Senate[8] quoted Professor Jerome LeJeune, the distinguished cytogeneticist from Paris:

> "If a fertilized egg is not by itself a full man being, it could never become a man, because something would have to be added to it, and we know that does not happen."

Professor LeJeune is not speaking here scientifically but metaphysically. If he is speaking solely in terms of genetics he is saying that a diploid human being is more complete than a haploid human being. This is an anthropocentric argument by a diploid human being with a brain about a haploid human being without a brain. If a spermatozoon had a brain and could communicate it might insist that diploids are its precursors and therefore are incomplete.

What Professor LeJeune has ignored is that the uniqueness of human beings does not depend solely on genes, a view put forward about 20 years ago by his fellow countryman Teilhard de Chardin[9]. The ability to learn after birth is of singular importance in shaping a grown adult. By the spoken and written word knowledge of different societies is passed on from generation to generation. Nobel Laureate Sir Peter Medawar states:[10]

> "In human beings, exogenetic heredity - the transfer of information through non-genetic channels - has become more important for our biological success than anything programmed in DNA...one should contemplate the plight of the human race if for any reason it did have to start again from scratch or a desert island; it is not heaven, but the old Stone Age, that lies about us in our infancy."

"PERSONHOOD" - BEGGING THE QUESTION

The word person is a medieval English noun that has many definitions. In Noah Webster's "An American Dictionary of the English Language", published in 1828, approximately 40 years after the time the U.S. Constitution was adopted and 40 years before the fourteenth amendment was enacted, three relevant definitions are given:

> (1) An individual human being composed of body and soul. We apply the word to living beings only, possessed of a rational nature; the body when dead is not called a person. It is applied alike to a man, woman or child. A person is a thinking intelligent being. (Locke)
>
> (2) A man, woman or child considered as opposed to things, or distinct from them.
> A zeal for persons is far more easy to be perverted, than a zeal for things. (Sprat)
>
> (3) A human being, considered with respect to the living body or corporeal existence only. The form of her person is elegant. You'll find her person difficult to gain. (Dryden)

It seems clear that it was only applied to the subclass of human individuals represented by men, women, boys and girls. I will use the word person as a common noun to denote this subclass.

The word "personhood" is a new word being used with increasing frequency in the current debate on abortions. The word is not defined in the third abridged Webster's Dictionary nor in the Oxford Dictionary. The suffix -hood means person and is applied to a word like boy to mean boyperson or the state of being a boy. Literally, the word "personhood" means personperson and presumably the state of being a man, woman, boy or girl.

Extending the definition of a word can be done neutrally or non-neutrally. The neutral way is to economize in the use of words as is sometimes done to write regulations. I am reminded of an anecdote told by Robert Graves[11]:

> "An old lady was taking a pet tortoise by train in a basket from London to Edinburgh and wanted to know whether she ought to buy a dog-ticket for it, as one has to do in England if one takes a cat by train - because cats officially count as dogs. 'No,' said the ticket inspector, 'No, mum! Cats is dogs, and rabbits is dogs, and dogs is dogs, and squirrels in cages is parrots; but this 'ere turkel is a hinsect. We won't charge you nothing, mum!"

The non-neutral way is to adjust the definition to achieve a given end. This is what the authors of S. 158 and H.R. 3225 have done so that the fourteenth amendment can be applied. To then promote an argument about the meaning of person and "personhood", as some would have us do,[12] after this artifice has been used, is question-begging. The argument distracts us from discussing the relevant questions:

(1) Can the proposed legislation be precisely interpreted, and what would be its effects if enacted? I have pointed out elsewhere the serious ambiguity of the word conception, which could lead to two very different interpretations of S. 158 and H.R. 3225.[3]

(2) What are the reasons for proposing this legislation?

(3) Under what circumstances should human beings cause death and save lives?[13]

EFFECTS OF THE PROPOSED CONSTITUTIONAL AMENDMENT AND RELATED BILLS BEFORE CONGRESS

Since the ultimate objective of the Right to Life Movement is to amend the U.S. Constitution, I will discuss their present proposals[2].

The end of Section 2 reads

> "...the word 'person' applies to all human beings, ..., including their unborn offspring at every stage of their biological development including fertilization."

It is obvious that the passage of this amendment would not only prohibit abortion, but the use of any type of contraceptive method where it has been suggested the method interferes with preimplantation development. Also, the treatment of a rape victim during the perimplantation period of development, and the treatment of infertility by in vitro fertilization and embryo transfer would be outlawed. The law would also raise the question as to the responsibilities of a woman to a preimplantation embryo she cannot possibly know she is carrying.

Section 2, however, needs to be scrutinized much more carefully as to its exact meaning. In explanation of this Section the report of the Special Human Life Amendment Committee reads (p. 6, column 3)[2]:

> "Roe v. Wade and Doe v. Bolton removed the protection of status as a person from the unborn. In restoring the protection this Section insures protection of the unborn as a person from the commencement of fertilization since there is no stage of the biological development of the unborn that would be outside the protection of this Amendment. The draft has added the words 'including fertilization' to the NRLC version to make clear that the reference to biological development includes even the earliest stage, the commencement of fertilization. This language retains the language that has been utilized by physicians since at least the 1850's to describe the needed protection for fetal life. See, e.g., Horatio R. Storer, M.D., CRIMINAL ABORTION IN AMERICA (Philadelphia: J.B. Lippencott & Co., 1860) pp. 10, 100, 107: '...the foetus (is) already, and from the outset, a human being, alive, however early its stage of development and existing independently of its mother ...it is not rational to suppose...that life...dates from any other epoch than conception...medical men, in all obstetric matters, are the physical guardians of women and their offspring... (Protection of the unborn child is required) at every stage of gestation (emphasis added)."

The effect of Section 2, then, depends on the interpretation of the phrase beginning of fertilization. This requires an arbitrary decision since fertilization is a process in the continuum of life. In 1972 the Committee on Terminology of the American College of Obstetricians and Gynecologists adopted the following definition of fertilization:[19]

> "Fertilization is the process that begins with the penetration of the secondary oocyte by the spermatozoon and is completed with the fusion of the male and female pronuclei."

To interpret this definition, however, requires the definition of penetration, yet another process, and of secondary oocyte. The definition also implies that haploid human individuals would be protected once they become involved in the process of fertilization. This inclusion would outlaw blocking the passage of the spermatozoa through the zona pellucida or the mechanisms that bind the sperm to the egg. If one protects these haploid individuals, why not protect all of them? The effect would be to outlaw all forms of artificial contraception and merely allow natural contraception, the official position of the Roman Catholic Church. Natural contraception has been stated to be the only acceptable method several times by Pope John Paul II. However, the enactment of such a law would prohibit the treatment of infertility by artificial insemination and even prevent a urologist from conducting a semen examination for the diagnosis of the cause of infertility.

HORATIO R. STORER ON THE BEGINNING OF LIFE

The ultimate authority that life begins at conception cited by the Special Human Life Amendment Committee is Storer, whose book was published in 1860[14]. The basis of Storer's assertion is of interest since at the time his book was published the mechanisms involved in the renewal of the life cycle were unknown. All his assertion amounted to is that life begins at the beginning of a process we do not understand.

Storer was a distinguished physician and scholar who graduated from both the Harvard Medical and Law Schools.[15] In 1856 he was selected to represent the Boston Lying in Hospital for Women on the Council of the fledgling American Medical Association. He was then appointed to chair a committee on criminal abortion whose widespread use was causing growing opposition among some segments of the medical profession.[16] During this time he published eight papers attacking abortion in the North American Medico-Chirurigal Review. These were published jointly in the book "Criminal Abortion in America". Storer's Committee came out in 1859 vigorously opposed to abortion,[17] and their findings received strong support from the 1860 President of the American Medical Association, Henry Miller[18]. His activities were very instrumental in pressing the State governments to pass anti-abortion laws in the second half of the nineteenth century. These laws were overturned by the decision of the Supreme Court on Roe v. Wade in 1973. Although not a Catholic, Storer's views coincide exactly with the doctrine of the Catholic Church. On page 40 he wrote:

> "I shall now quote from an admirable letter I have lately recieved from the Catholic Bishop of Boston. The extracts are couched in so forcible language, and their spirit is so thoroughly Christian, that I need not apologize for their length, or that they recapitulate arguments I have already advanced."

Bishop Fitzpatrick's letter reads (p. 40):

> "The doctrine of the Catholic Church, her canons, her pontifical constitutions, her theologians without exception, teach, and constantly have taught, that the destruction of the human foetus in the womb of the mother, at any period from the first instant of conception, is a heinous

crime, equal, at least, in guilt to that of murder. We find it distinctly condemned as such even as far back as the time of Tertullian, (at the end of the second century) who calls it festinatio homicidii, a hastening of murder. The Pope, Sixtus the Fifth, in a bull published in 1588, subjects those guilty of the crime to all the penalties, civil and ecclesiastical, inflicted on murderers. It is denounced and reprobated in many other canons of the church.

The reason of this doctrine (apart from the authority of the church) must, it seems to me, appear evident upon a little reflection. The very instant conception has taken place, there lies the vital germ of a man. True, it is hidden in the darkness of the womb, and it is helpless; but it has sacred rights, founded in God's law, so much the more to be respected because it is helpless. It may be already a living man, for neither mothers nor physicians can tell when life is infused; they can only tell when its presence is manifested, and there is a wide difference between these two things. At any rate, it is from the first moment potentially and in radice a man, with a body and a soul destined most surely by the will of the Creator and by his law, to be developed into the fullness of human existence. No one can prevent that development without resisting and annulling one of the most sacred and important laws established by the Divine Author of the universe, and he is a criminal, a murderer, who deals an exterminating blow to that incipient man, and drives back into nothingness a being to whom God designed to give a living body and an immortal soul.

From this it follows that the young woman whose virtue has proved an insufficient guardian to her honor, when she seeks by abortion to save in the eyes of man that honor she has forfeited, incurs the additional and deeper guilt of murder in the eyes of God, the judge of the living and the dead. Who can express what follows with regard to these women, who, finding themselves lawfully mothers, prefer to devastate with poison or with steel their wombs, rather than bear the discomforts attached to the privilege of maternity, rather than forego the gaieties of a winter's balls, parties, and plays, or the pleasures of a summer's trips and amusements?

But abortion, besides being a direct crime against a positive law of God, is also an indirect crime against society. Admit its practice, and you throw open a way for the most unbridled licentiousness, you make a woman a mere instrument for beastly lust. Every woman is somebody's mother or daughter or sister or wife; or she bears all these relations at once. Whatever protection, therefore, we would claim for a woman because she stands in any of these relations to us, we should also extend to all women, because they bear some one of all these relations to others. Most assuredly then, we should remove none of the safeguards that protect female virtue. But if we take away the responsibility of maternity, we destroy one of its strongest bulwarks.

> It affords me pleasure to learn that the American Medical Association has turned its attention to the prevention of criminal abortion, a sin so directly opposed to the first laws of nature, and to the designs of God, our Creator, that it cannot fail to draw down a curse upon the land where it is generally practiced."

Thus, by their own admission, in quoting Storer as their ultimate authority on when life begins, the Special Life Amendment Committee of the Right to Life Movement are proposing to amend the U.S. Constitution based on dogmatic statements most clearly made by representatives of the Roman Catholic Church.

CAUSING DEATH AND SAVING LIVES[13]

Intuitively almost no human being likes to sanction killing; nearly all human beings want to save lives. If the world were simple, these inherent feelings would play a dominant role in determining a utopian world. Unfortunately, the world is not simple, and we have to face very difficult choices that involve the lives of fellow human beings. Many philosophers, moralists and theologians have studied these problems for centuries and there are no universal answers. Yet the world evolves and we cannot wait for the theoretical answers we would like before having to make profound decisions. Politicians sometimes have to decide whether or not to commit those they represent to war, which means they require and sanction young men to kill their enemies. Contraception involves the destruction of human life but is unfortunately necessary, in the view of many people, because of the evil effects of overpopulation that can lead to immense human misery in the form of hunger, disease and social unrest that generates killing. One does not have to spend long in the slums of cities like Bombay, Dacca and Mexico City, as I have done, to realize the horrors of uncontrolled human reproduction and the need to interrupt the human life cycle.

Abortion of a fetus, which already has the physical form of a human being, is offensive to almost all people, including physicians, who have to develop psychological defense mechanisms that enable them to face the human misery they meet daily. To determine whether or not abortion is sometimes justified it is necessary to set our emotional reactions aside. To refuse to analyze the problem by invoking a religious dogma, by adopting a simple-minded approach to religion -- it is wrong to interfere with God's work -- or by adopting the position that any change in our established morality is certainly bad is merely avoiding the issues. Psychologically these positions could be described as defense mechanisms to avoid thinking about a distasteful subject. Likewise, the generation of uncontrolled emotions by the display of pictures of aborted human fetuses, which some members of the Right to Life Movement do, is a particularly reprehensible form of escaping the issues.

Abortion is surely justified under some circumstances. Storer, a leading foe of abortion, was able to relax his position under gruesome circumstances that were frequent a century ago, which modern medicine has overcome. This concerned the problem of childbirth where the fetus was too large to pass through the birth canal. If nothing was done, the mother and fetus would both die. By destroying the fetus and delivering it after partial dismemberment, the mother could have a chance of survival. In "Criminal Abortion in America" Storer wrote:

> "In cases where instrumental delivery is absolutely necessary, the ceremony of baptism as ordinarily administered is of course impossible. But as this is deemed

so important by the Catholic Church, even to the sacrifice of the mother, any means of overcoming this obstacle, fatal to countless maternal lives, should be accounted, if found practicable, of the utmost importance. For this purpose, therefore, I do not hesitate to recommend intra-uterine baptism, the consecrated element being carried to the child, if too high to be reached by the hand, by a sponge and staff, or if necessary, by a syringe, as was long ago sanctioned by the theologists of the Sorbonne; in the absence of a clergyman, if the case is urgent, the rite accounted so sacred being performed by the physician in attendance rather than to allow the death of the mother. I know that many of the profession, from fear of ridicule or dislike to sanction what they do not believe in, would shrink from such a duty. Is it not, however, due to humanity in every way to prevent this frequent murder? for such, by our apathy and neglect, the mother's death in these cases becomes. Can we, as Christians, refuse any aid? I am not ashamed to acknowledge that for myself, though no Catholic, I have performed this intra-uterine baptism, where delivery without mutilation was impossible. I could neither conscientiously assert the child's death, nor allow the mother to linger till it should occur, while the friends, in the absence of a priest, whose presence it was impossible to procure for many hours, would not permit the operation.

> Remonstrance was useless; had I refused I should have been morally responsible for the almost inevitable death of the woman; it was, therefore, simply my duty."

Fortunately, contemporary obstetricians no longer face this problem because modern surgical techniques and antibiotics have made Cesarian section a routine procedure. There still exist, however, cases where a decision has to be made that involves sacrificing a fetus to save a mother. Recognized conditions are heart disease after previous cardiac decompensation, advanced hypertensive vascular disease, and carcinoma of the cervix.[20]

Another situation where I believe abortion is justified concerns pregnancy in very young teenagers. This condition can now arise in the 12th year of age. Many of these girls are unable to physiologically adapt to the demands of a rapidly growing fetus with the result that both the mother and fetuses lives are placed in jeopardy. Moreover, both may be permanently harmed. The reasons that the cases arise are probably due to the fact that improved nutrition in our society over the past 100 years has reduced the age of menarche from 17 to 11 years of age.[21] At the same time there has been strong resistance to educating our children in the basic principles of sexuality. The frequently expressed view that these matters should be taught by parents would be fine if the parents knew what to teach. Unfortunately, because of their heritage, they often do not.

I also believe that abortion is justified in cases of rape in which a woman suffers physical and emotional anguish as the result of assault. Under these circumstances a woman should be able to insist on a total right to control the use of her own body.

There are other situations in which abortion is done which I find difficult to analyse. One situation concerns abortion because of the diagnosis of genetic disease. I have every sympathy with a couple who find following amniocentesis that the fetus is suffering from Tay-Sach's Disease and that the baby will suffer an early, horrible death. My intuitive reaction is that an abortion is justified in this case. My problem is that in the spectrum of genetic diseases, and now at least 75 can be diagnosed prenatally,[22,23] where does one draw the line. Perhaps the answer is that a rigid line should not be drawn.

The other situation that I find difficult to analyze is the use of abortion as a contraceptive measure. A couple who decide to control the size of their family by the conscientious use of contraceptive methods may legitimately justify the use of abortion in the first trimester of pregnancy as a back-up for contraceptive failure. However, I sympathize with Bishop Fitzpatrick's position when he condemns the use of abortion following unbridled licentiousness.

The abortion issue is therefore a complex problem in itself. Before a total ban is enacted, a pluralistic society should discuss unemotionally all the issues involved in order to determine when abortion is justified and whether legislation or peer pressure is the best way of controlling it. We should de-emphasize the central role of fertilization in reaching moral judgments and legal decisions, as it is merely one transition in the cycle of life. Fertilization does not mark the beginning of life and therefore it should not set the boundary between acceptable and nonacceptable methods of contraception, prevent the treatment of rape, and the treatment of infertility by *in vitro* fertilization and embryo transfer.

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THE TAILORING OF SCIENCE TO ENACT A LAW

John D. Biggers, Professor of Physiology
Harvard Medical School

In January 1981 identical Bills, S. 158 and HR 900, were introduced before the U.S. Senate and House of Representatives

> "To provide that human life shall be deemed to exist from conception."

The reason the Bills have been introduced is to outlaw abortion by using the following argument: Human life from conception is represented by persons; the lives of persons are protected by the due process clause of the fourteenth amendment of the Constitution; hence, abortions cannot be done without ensuring that the unborn child has been granted this legal right.

The Report of the Human Life Amendment Committee of the National Right to Life Movement,published January 27, 1981, in National Right to Life News, stated in Section 2 of its draft amendment:

> "With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of amendments to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization."

In the explanatory paragraph it is revealed that "biological development includes even the earliest stage, the commencement of fertilization."

It is helpful to evaluate these proposals in the context of the human life cycle. Fertilization renews the life cycle by initiating development and growth controlled by a new sample of the gene pool. The first part of this process occurs in a woman's genital tract. Eventually a baby is born, and it continues to develop and grow. Maturity is eventually reached, and this phase is followed by senescence and death. During the period of maturity, the individual may participate in the process of reproduction involving a phase represented by the spermatozoa and ova, which renew the life cycle. Thus biological human life is passed on without interruption from generation to generation.

That Congress should consider enacting a Bill to provide for an elementary biological fact is surprising. It is equivalent to asking Congress "To provide that sunlight be deemed to exist from sunrise."

We should recognize that the controversy in S. 158--attempting to assign the word "person" to a particular phase of the human life cycle--is not a scientific one, and that the implication in Section 1 that the Bill has scientific respectability is irrelevant to the debate. Couching the Bill in this form is a ploy to conceal the real issues which are metaphysical and legal in nature. However, science has the important role of ensuring scientific words are used with clarity.

What do the authors of the proposed amendment mean by "commencement of fertilization"? Fertilization is a process spread over time, and the definition of its beginning is arbitrary. For example, does it begin with the final maturation of the sperm and the egg before they fuse? Does it begin when the spermatozoa enter the cellular barriers around the ovum? Does it begin when the sperm enters the ovum? Or does it begin when the nuclei of the sperm and egg fuse?

What do the authors of S. 158 mean by "conception"? The majority of reproductive biologists would equate it with fertilization. Representative Hyde, however, has explicitly used it to mean implantation in the uterus, which is a process that takes place about six days after the penetration of the ovum by the sperm.

It is obvious that the wording of both the proposed amendment and the Senate bill are each imprecise and could open the way for unlimited litigation. This could prevent the use of the most effective contraceptive methods--the oral pill and the intrauterine device--and impede or halt the development of new improved methods. It could severely damage family planning, not only in the United States but in many other countries as well. It could forbid the treatment of a rape victim during the six-day preimplantation phase of development. The treatment of infertility by in vitro fertilization and embryo transfer would be outlawed.

A law applying from fertilization could imply that a woman is responsible for a preimplantation embryo she cannot possibly know is present, and therefore hold her responsible for any damage to a child resulting from activities or medications taken during the preimplantation phase. Should she therefore always assume she may be pregnant, and adjust her behavior accordingly? What this behavior should be is obscure.

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May 27, 1981

Senator Max Baucas
United States Senate
Washington, D.C. 20510

Dear Senator Baucas:

The following is in response to your letter of May 13, 1981 regarding my medical opinion of Senate Bill #S.158.

It is my belief that the question of human personhood and when human life first exists is an unanswered scientific question but not a moral, ethical, religious or political question. I believe that it would be disastrous to the proper care of human subjects if either religion or politics entered into or contributed to this decision. If passed, S.158 would seriously jeopardize medical care of thousands of individuals in this country. Obviously, it would eliminate the possibility of both elective and, more importantly, indicated termination of pregnancy. If extended, it would deprive the medical profession and subjects from the possibility of antenatal diagnosis of genetic disorders. If interpretation would be extended to the extreme, this could deny our population the right to utilize contraception methods. I would be happy to offer any support to the efforts to defeat passage of this bill.

Sincerely yours,

Edward H. Bishop, M.D.
Professor, Obstetrics and Gynecology

EHB:lh

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER 1753 WEST CONGRESS PARKWAY, CHICAGO, ILLINOIS 60612

1981 JUN -9 AM 9 55

ROBERT S. BLACKLOW, M.D.
PROFESSOR OF MEDICINE

June 4, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am pleased to respond to your letter of May 13, regarding S. 158. The proposed bill purports to derive its conclusions from science but deals with questions to which science can provide no answer. The question of human personhood is a matter of moral, philosophical and religious values. It is not a medical, a scientific or a political question, and therefore data from those disciplines cannot determine what is "personhood". If S. 158 were to be enacted, a rigid interpretation of the law might mean that the use of contraceptives, their prescription, the screening for genetic diseases, etc., could be regarded as homicide and the participants prosecuted in a court of law. The implication for the practice of medicine would be profound. I urge the Senate not to create unworthy legislation based on pseudoscience and reject the bill.

I hope this is helpful to you in your deliberation.

Yours sincerely,

Robert S. Blacklow

Robert S. Blacklow, M.D.

RSB:mh

xc: John A.D. Cooper, M.D., Ph.D.
Association of American Medical Colleges

THE UNIVERSITY OF CONNECTICUT
HEALTH CENTER

1981 APR 28 AM 10 33

April 24, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Your letter dated April 14, 1981 concerning hearings by the United States Senate Judiciary Committee Subcommittee on Separation of Powers on S. 158 just arrived on my desk. I am pleased to reply to your request for my evaluation of some of the issues raised in the Bill S. 158 and in your letter.

In my opinion, a human life in the sense of an actual human person begins when an individual is capable of independent existence outside its mother's uterus. I do not support the proposition that human life in the sense of an actual human person begins at conception.

From the viewpoint of an obstetrician entrusted with the health of pregnant women and their unborn children, I believe that each mother is responsible for decisions that affect her and her unborn fetus, so long as that fetus is dependent upon the mother for sustenance. Accordingly, decisions concerning a dependent fetus are not the prerogative of moralists, ethicists, philosophers, scientists, lawyers, physicians, religious persons or politicians. These decisions should be made by the mother, with the help and advice of obstetricians or any other individuals the mother chooses for counsel.

Based upon my views, I am opposed to the passage of the United States Senate Bill S. 158. Because of your interest, I am taking the liberty of sending a copy of this letter to the other members of the Senate Judiciary Committee.

Sincerely yours,

Jack N. Blechner, M.D.

Jack N. Blechner, M.D.
Professor and Head
Department of Obstetrics and Gynecology

JNB/bc
cc: Senate Judiciary Committee Members

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1981 JUN -1 AM 10: 29

May 28, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your letter of May 13 and to the four direct questions which it posed.

I would answer your first two questions together by saying that it seems to me that the determination of "human personhood" is a semantic or definitional matter with each individual choosing a moral, ethical, philosophical, religious, or political basis for defining the term "personhood." Thereafter, some persons attempt to use scientific observations to support or reject the validity or reality of their definitions. Thus, I do not believe that science can settle the issue of "personhood." For example, science can demonstrate to the satisfaction of most that the fertilized egg contains no brain, no heart, no kidneys, no bones and no skin, but only the information required for subsequent generation of these organs. Whether or not the instructions as to how to generate these organs as distinguished from the organs themselves constitute a "person" does not appear to me to be a scientific or medical question. With respect to S. 158, the semantic ambiguity lies in the words "actual human life" on lines seven and eight of page one. In my view, this term is ambiguous in its breadth. For example, I believe one might argue that an isolated human sperm cell or an isolated human ovum constitutes "actual human life" in the literal meaning of these words since there is no implication of complete or potentially complete human life contained in those words.

I hope these views will be of some use.

Sincerely,

Stuart Bondurant, M.D.

SB/dld

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1981 APR 24 PM 12: 01

April 21, 1981

Senator Max Baucus
U.S. Senate
Washington, DC 20510

Dear Senator Baucus:

Enclosed is the testimony I prepared on Senate Bill 158, at the request of Mr. Kay and per your letter of April 16, 1981.

Sincerely yours,

Robert L Brent

Robert L. Brent, M.D., Ph.D.
Professor and Chairman,
Department of Pediatrics

COMMENTS TO THE UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON SEPARATION OF POWERS
On Bill S. 158
A Bill to Provide that Human Life Shall be Deemed to Exist from Conception

April 23-24, 1981
Washington, D.C.

Submitted by Robert L. Brent, M.D., Ph.D.
Professor and Chairman
Department of Pediatrics
Professor of Radiology
Professor of Anatomy
Director of the Stein Research Center
Jefferson Medical College
Thomas Jefferson University

Testimony of Robert L. Brent - 4/81

This testimony is presented to the Senate Committee as part of the hearings dealing with the "definition of the beginnings of life."

I am a scientist interested in the mechanisms of birth defects and their prevention, having spent the last 30 years as a research scientist in the fields of embryology and as a clinician interested in the diagnosis and causes of human birth defects.

There are distinct differences between the definition of "life", "viability" and "human qualities."

The question has been raised "when does life begin?" In the human species life does not begin--it is continuous. The infant grows into an adult with reproductive capacity. The primitive sex cells in the adult man and woman continuously produce sperm and eggs with reproductive potential. The combination of one sperm and one egg have the potential for producing a unique human being, before, as well as after fertilization. Although fertilization is the process that starts the human embryo on its way toward embryonic development and birth, the process of fertilization is no more completed or miraculous than is the development of the sex cells (meiosis) or the early development of the embryo (organogenesis). In essence, life is continuous and the uniqueness of the human is due to the limitless combination of genetic determinants that can occur during the process of sex cell development, fertiliztion and cleavage. In fact, the uniqueness of each individual human is contributed to more by processes before fertilization than by fertilization and embryonic development. Therefore in the human, the life process is a continuum.

If "viability" is defined as the time when a human organism can be sustained without the protection of its mother, then we will constantly have to redefine the stage of viability. Ten years ago infants weighing less than 1000 grams rarely survived. Today, a significant proportion of 1000 gram infants survive. The development of artificial lungs or artificial placentae, the refinement of embryo transfer and embryo culture may further decrease the age when the embryo is defined as "viable."

There should be little controversy over the definition of life (being alive) and viability (independence from the mother). Objective scientists should readily reach a consensus on these terms, because they are based on scientific concepts and principles.

On the other hand it would be presumptuous for a scientist to conclude that the scientific method can provide us with the answer to the question of when does the developmental process result in the production of human life. When do the developing sex cells, the fertilized zygote or the developing embryo become human. That is a question that a biomedical scientist cannot answer without falling back on his or her moral, ethical, religious or emotional beliefs. Each day that the developmental process proceeds results in the presence of more qualities that would be considered to be human. There is no time that the sex cells, zygote or embryo are devoid of human qualities. Because of the multifaceted nature of our society there is a wide variation in the opinions of our citizens regarding the humaness of the developing embryo. This diversity of opinion is not based on scientific data but on the religious, ethical, moral and emotional upbringing of that individual.

It is a clear violation of scientific objectivity to imply that one can resolve moral questions of this nature with biological data. I could readily create an argument supporting opposite viewpoints concerning the time that human life begins--but I would be committing a disservice to our non-scientific citizens, for I would be distorting the purpose of science and utilizing my scientific credentials in a field (ethics and morality) that scientists have no more expertise than do other citizens.

It is obvious that this discussion pertains to the appropriateness of therapeutic abortions and whether the fetuses' rights, as a human being override the rights of the mother, in whose body the embryo or fetus resides.

The legal heritage of this nation is almost by definition a recognition of the diversity of ethical, moral and religious beliefs. The legislative process slowly recognizes changes in ethical and moral standards. Because of the varied religious and ethnic backgrounds of our population it is difficult to obtain a consensus about the ethical questions relating to abortion, contraception and fetal research. In fact recent rulings of the Supreme Court concerning abortion have polarized our society.

If one views these issues from a historical perspective, one should be optimistic, since eventually the ethical and moral diversity of the people of our democracy will be reflected in the laws of the land. Ethical and moral positions of responsible groups are frequently viewed by protagonists as being right or wrong. Like feelings they are neither right nor wrong, but only reflect the inner rules of a culture. Each of us tends to be quite "uncritical" of the rules of our personal culture and very "objective" about the morals and ethics of other cultures and religions. This concept is exemplified superbly by the response of the leader of a tribe of cannibals when asked by an inquisitive missionary "if it was true that in his tribe they killed people and ate them." The leader of the tribe answered the civilized missionary with a question. "Is it true in your world that you kill people and don't eat them?"

There are many controversial issues that will directly effect the incidence of congenital malformations, the incidence of morbidity and mortality in newborn infants, the extent of future developments in biomedical research and the quality of health care. The resolution of these issues can occur by decisions of courts, by state and national legislative changes, or both. Since we previously indicated that these issues reflect emotionally charged ethical opinions, in many instances they are neither right nor wrong. Therefore legislative alternatives should reflect the beliefs of all of our citizens so that we do not aggrandize the beliefs of some and demean the beliefs of others. For one of the foundations of a democratic society is our ability to permit the existence of a divergence of moral, religious and ethical beliefs. It is a concept that is basic to our freedom and our history of tolerance.

1981 JUN -5 AM 10 17

The University of Texas
Health Science Center at San Antonio
7703 Floyd Curl Drive
San Antonio, Texas 78284

Medical School
Department of Pediatrics

Office of the Chairman
(512) 691-6264

June 3, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your query about the definition of "human personhood as beginning at conception".

The question of "human personhood" is a philosophical and religious one that cannot be addressed in a scientific sense. I do not feel that the acquisition of additional data will in any way help to resolve this question.

It is my judgement that enactment of S.158 will have a major impact on the practice of medicine as well as on our society. As a pediatrician I am most concerned about the impact on children. At the present time we have an intolerable number of children who are abused, either because they are not wanted or because their parents lack parenting skills. Any measures that result in an increase in unwanted children can only aggravate this problem. You are probably well aware that approximately 1 in 5 babies born in this country are born to teenaged mothers. Asking these young women to bear children which they do not want is the worst type of child abuse. What is more, the children resulting from these pregnancies will produce a society decades later that none of us will be happy with. Finally, any measures that compromise our ability to terminate pregnancies that will yield children that are predictably defective will simply place an increased burden on this society and particularly on the unfortunate families that are asked to raise these children.

In summary, I do not feel that defining life is a matter for legislation. If this bill is passed, moreover, I think you will have a profound effect on health care as well as on society in general. Thank you for this opportunity to comment.

Sincerely,

Philip A. Brunell, M.D.
Professor and Chairman
Department of Pediatrics

1981 JUN -1 PM 2:14

THE UNIVERSITY OF TEXAS MEDICAL BRANCH
GALVESTON, TEXAS 77550

Office of the Dean of Medicine
(713) 765-2671

May 28, 1981

Senator Max Baucus
Subcommittee on Separation
 of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Thank you for your letter of May 13 regarding S. 158. I am pleased to provide my personal, professional opinions on the questions you raise. My comments are not to be construed as reflecting in any way the policies of The University of Texas Medical Branch or The University of Texas System.

I do not believe that the definition of human personhood is a medical and scientific decision only. It also relates to ethical, moral, philosophical, religious and political issues as well. Thus medical and scientific opinion alone should not be the sole determinants of our actions in this matter.

In my training as a physician I have experienced the horror of young women suffering and dying from the complications of unsterile, crude, unethical abortions. You never forget the patient who died from tetanus! I also have counseled with many families regarding cystic fibrosis of the pancreas, neurofibromatosis, congenital adrenal disorders, congenital thyroid disorders and genital disorders. None of these have resulted in an abortion. Thus my views expressed above and below are with some experience and are largely pragmatic.

It will be a personal human disaster for thousands of women, especially the uneducated and poor, if legal, sterile abortions are not available in this country. The affluent will simply go elsewhere as was done three decades ago. I think that abortion as one option is neither immoral, areligious or unethical if carried out with full understanding before the stage of extrauterine viability. No good is served by forcing unprepared parents to give birth to infants who have little chance of survival, or who are doomed from the outset by the genetic makeup of their parents.

Sincerely yours,

George T. Bryan

George T. Bryan, M.D.
Dean of Medicine
Professor of Pediatrics

GTB:bvh

VANDERBILT UNIVERSITY
NASHVILLE, TENNESSEE 37232
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Department of Obstetrics & Gynecology - Direct phone 322-2111

May 28, 1981

The Honorable Max Baucus
The United States Senate
1107 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Baucus:

I am responding to your letter dated May 13th, 1981, regarding questions pertinent to S-158.

1. I do not believe that the question of human personhood is strictly a medical or scientific question.
2. It is my view that the question of human personhood is, in part, a moral, ethical, philosophical, religious, or political question.
3. I do not believe that medical and scientific data alone can determine the definition of human personhood.
4. In my judgement, the enactment of S-158 would have a serious adverse effect on the practice of medicine, on genetic screening and its benefits, and on the use of contraceptives.

I believe that the enactment of S-158 would be a serious mistake, and hope that you and your colleagues will do everything possible that this proposed legislation is defeated.

Sincerely,

Lonnie S. Burnett

Lonnie S. Burnett, M.D.
Professor and Chairman

LSB:vm

WAKE FOREST UNIVERSITY
BOWMAN GRAY SCHOOL OF MEDICINE
300 South Hawthorne Road • Winston-Salem, North Carolina 27103

Department of Pediatrics

May 26, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

I am writing in response to your letter of May 13, 1981, requesting an opinion regarding the proposition that human life in the sense of an actual human being or legal person begins at conception. This opinion refers directly to the hearings that are currently in progress on S. 158. I have reviewed that bill and will attempt to answer each of the questions you have posed.

1. I firmly believe that the question of human personhood is not a medical or scientific one. The complex concept of humanity or "humanness" is not one that can be specifically addressed by science since ideas relating to humanness cannot be tested experimentally in any scientific fashion.

2. It is my view that answers to the question of when human personhood begins are derived almost totally from an individual's own moral, ethical, philosophical and religious viewpoints. The answer to this question brought forth by any one individual lies in the realm of personal beliefs, and is not based on any scientific facts.

3. Medical and scientific data alone cannot be used to determine what the definition of human personhood should be, since there is no scientific evidence which relates directly to this question. Furthermore, it is extremely unlikely that such scientific evidence will be forthcoming because of the complexity of the concept.

4. It is my opinion that the impact of S. 158 on medical practice, if enacted, would be devastating and detrimental to the welfare of the patients that we serve. Many of the medical advances of the past decade that have served to greatly enhance the quality of life for children and families could be no longer utilized. During the past decade, methods have been developed to allow for the prenatal diagnosis of many serious birth defects and genetic

disorders which are fatal in childhood or which result in severe mental and physical handicaps. For the vast majority of these disorders, no effective therapy is available. Prior to the development of prenatal diagnostic methods, parents who were at risk for having a child with one of these disorders would often elect to have no further children because of the fear of having another affected child. The availability of prenatal diagnosis has provided these couples with the opportunity to have normal healthy children. While it is true that some fetuses with demonstrated defects have been aborted as the result of prenatal testing, there is firm evidence to indicate that the net result of the availability of prenatal diagnosis has been an increase in the number of healthy children born to such families. Because medical science has so little to offer such families in the way of therapy for these extremely devastating disorders, the availability of prenatal diagnosis has been a very positive development.

If S. 158 were enacted, a number of our most effective contraceptives would also be eliminated from medical practice. The most outstanding example of this is the intrauterine device which has been an extremely reliable and effective method of contraception for many women. This device could no longer be used, since the mechanism of action of the IUD is to prevent implantation of the fertilized egg. The so-called "morning after pill" which also acts to prevent implantation of the fertilized egg, would also be banned from use. This pill has been extremely useful in the past in preventing pregnancy in women who have been victims of rape or incest.

Overall, I feel that the impact of S. 158 would be to severely limit the humanity of medical practice. It would severely restrict the options that can be offered to individuals and families who find themselves in very distressed and unfortunate situations. These are families who need all of the support and compassion from the medical profession that can be provided. Our ability to provide this support will be restricted by the implications of S. 158.

I appreciate having had the opportunity to voice my opinion on this very important issue. If you need any additional information, please feel free to call on me.

Sincerely,

Barbara K Burton

Barbara K. Burton, M.D.
Department of Pediatrics
Bowman Gray School of Medicine
of Wake Forest University
Winston-Salem, NC 27103
For: Jimmy L. Simon, M.D., Chairman

JLS:bc

College of Physicians & Surgeons of Columbia University | *New York, N.Y. 10032*

OFFICE OF THE DEAN
of the FACULTY OF MEDICINE

630 WEST 168TH STREET

June 3, 1981

Hon. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your recent letter, I am pleased to provide my personal views on the important questions you have raised concerning S. 158. Specifically, my responses to your questions are as follows:

1. I believe that the question of human personhood is basically a medical and scientific assessment, however, I do not believe that such an assessment can be made in the total absense of consideration of prevailing religious and philosphical views.
2. It is my opinion that the question of human personhood involves scientific, moral and ethical considerations, but certainly is not, and should not be a question subject solely to political or legislative judgment.
3. As indicated in my previous responses, I believe that medical and scientific data, while of primary importance, must in addition take cognizance of prevailing religious and ethical views on this subject.

4. I believe that if S. 158 were enacted in its current form, it would set a dangerous precedent in attempting to provide a legislative answer to a complex question which transcends a purely political solution. Medical and scientific evidence, plus religious and ethical considerations, in my view, will be required to make a just decision on this question.

I hope these brief responses will be helpful in the deliberations of your Subcommittee. If I can be of further assistance, please let me know.

Sincerely,

Bernard Challenor

Bernard Challenor, M.D.
Associate Dean

BC:pt

St. Louis University
Medical Center

School of Medicine
1402 S. Grand Blvd. St. Louis Mo 63104
314 664-9800

Office of the Dean

1981 JUN -1 AM 10: 42

May 28, 1981

The Honorable Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

I am replying to your inquiry regarding opinions on some of the issues raised by S.158.

I do not believe that the question of human personhood is a medical or scientific question and you should not expect the issue to be resolved in those arenas. The scientific question is simply at what time is there reasonable expectation of extra uterine viability, and that period changes somewhat with improved technology.

The statement to the Congress by Dr. Leon Rosenberg is eloquent and coincides with my views. At this point in time at least, the question of human personhood is primarily a philosophical question. Attempts to legislate on unresolved philosophical issues will create great controversy and can only lead to political turmoil. I believe that the definition of human personhoood is best left to individual decision based on the individual's own complex calculus of the best of current scientific and philosophical hypothesis.

Attempts to legislate otherwise would have a significant inhibitory impact on the practice of medicine, on the freedom of physicians and their patients to make personal decisions, and on a variety of other diagnostic, therapeutic, and contraceptive techniques which may put the fertilized ovum or fetus at risk but which are of value to the mother, the family, or even to possible therapy of the potential fetus.

Yours truly,

DR Challoner

David R. Challoner, M.D.
Dean

DRC:jb

THE MILTON S. HERSHEY MEDICAL CENTER
THE PENNSYLVANIA STATE UNIVERSITY

DEPARTMENT OF OBSTETRICS & GYNECOLOGY
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717 534-8141

May 27, 1981

Senator Max Baucus
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I very much appreciate your letter inviting me to respond to your questions related to the United States Senate Judiciary Committee Sub-Committee on Separation of Powers.

I'd like to summarize my response by indicating that I concur entirely with the testimony presented by Dr. Rosenberg of Yale University. I concur with him as a physician, as a scientist, and as a citizen of this country.

Specifically, in response to your questions:

1. I believe the question of human personhood is not a medical or scientific question.
2. I believe that the question of human personhood is a moral, ethical, philosophical, religious and/or political question.
3. I believe there is no medical nor scientific data alone that can determine what the definition of human personhood should be in the present context.
4. In my judgment S. 158 impacts adversely upon the practice of medicine through its language which encompasses genetic amniocentesis, the use of contraceptives such as the combination pill and the IUD, as well as on those judgments that pertain to immature delivery.

I strongly regret that the issue of abortion continues to interfere with the other business of government in a country built on a heritage of pluralism.

I am most appreciative of your inviting me to respond.

Sincerely,

Ronald A. Chez

Ronald A. Chez, M.D.
Professor and Chairman
Department of Obstetrics
and Gynecology

RAC/ch

THE JOHNS HOPKINS HOSPITAL
BALTIMORE, MARYLAND 21205

1981 APR 27 AM 10:48

Department of Pediatrics

23 April 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for yours of April 16 asking my views on the bill, S-158. I do not see how a definition of the onset of personhood could be regarded as a medical or scientific question. Personhood is something we all define variously. It has no physical, measurable properties, and therefore the hypothesis that it begins at this point or that is not subject to test in any conventional scientific way. So it is in the realm of metaphysics or morals, which is perhaps why it is so frequently perceived to be a matter of religious dogma. It is, of course, entirely reasonable for physicians and scientists to express their views, even convictions, on the subject; but I know of no data that could be collected according to the rules of science which would be likely to show all but one definition to be false.

I hope these comments are of help in considering this bill.

Yours very truly,

Barton Childs

Barton Childs, M.D.

BC/bme

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May 26, 1981

Senator Max Baucus
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am in receipt of your letter of May 13, 1981 in which you address questions regarding S. 158. In the following statements I shall attempt to answer the questions which you have raised.

#1 Do you believe that the question of human personhood is a medical and scientific question? Answer: No.

#2 Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? Answer: Yes.

#3 Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? Answer: No.

#4 What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other? Answer: On the practice of medicine -- there will most likely be a resurgence of criminal abortions in the United States with return to untold human misery as existed prior to the progressive liberalized abortion laws extending from the late 1960's and the Supreme Court ruling of the early 1970's.
On genetic screening -- the prenatal detection of chromosomal and genetic disorders would serve little purpose other than informing prospective parents of the forthcoming birth of an abnormal individual. My perception of S. 158 indicates that parents would have no choice regarding interruption of such a pregnancy. Furthermore, the prohibition of public funds, facilities, personnel and other assistance for the performance of abortions in such cases would simply make it more expensive to care for the abnormal individuals if they were allowed to proceed through the entire gestational period and be born alive.

> On the use of contraceptives -- the use of certain types of contraceptives would be prohibited since by the very nature of their function conceptuses would not be allowed implantation and, hence, would be in effect acting as abortifacients. These types of contraceptives, specifically intrauterine devices and postcoital hormonal agents, would no longer be available to large numbers of individuals who, for whatever reason, are unable or unwilling to use other forms of contraception.

In summary, sir, I would state categorically that the question of definition of human personhood beginning at conception should be left to philosophers, moralists, ethicists and men and women of theological bent rather than to legislators. Human life should certainly be regarded as a continuum from parent to child to grandchild etc. Social implications regarding unwanted children or abnormal children, in my view, outweigh "the legal" definitions of the beginning of human personhood. Passage of S. 158 would compound the social and economic problems of abnormal and/or unwanted children.

If I may be of further service to you and to the Judiciary Committee, please do not hesitate to contact me. Please be advised that the above views are in no way to be construed official of Duke University or the Duke University School of Medicine but rather should be construed as my own personal views.

Sincerely yours,

Arthur C. Christakos

Arthur C. Christakos, M.D.
Professor, Obstetrics and Gynecology
Associate Dean, Medical Education

ACC:jl

1981 JUN -1 AM 10 35

D. Kay Clawson, M.D.
810 Delong Road, Rt. #1
Lexington, Kentucky 40503
May 28, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

RE: Senate Bill 158

Dear Senator Baucus:

1. Do you believe that the question of human personhood is a medical and scientific question?

   A cell or even two or more cells do not make a human being. A human being is something special beyond an aggregate of cells and must have a brain, circulatory, respiratory and gastrointestinal system that is capable of survival beyond the being of another person. In this sense one can determine a human being on medical and scientific grounds.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

   From the practical standpoint, the question of when is a person a true human being must take in moral, ethical, philosophical, religious or political differences and it is essential that society address this issue in the broader context of what is life and what is death as well as when is someone a "human being".

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

   I do not believe it is possible for the medical and scientific word alone to make these judgements.

4. What, in your judgement, would be the impact if S.B. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

   The enactment of Senate Bill 158 would be a catastrophic decision, but in the long run would be so costly for the medical and institutional care of hundreds of thousands of individuals that the present concern over the cost of medical care would seem infinitesimal compared to the order of magnitude of what would ensue over the next two generations should this bill be enacted.

Most sincerely,

D. Kay Clawson, M.D.

DKC/kj

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Robert E. Cleary, M.D., F.A.C.O.G.
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Telephone (317) 872-0582

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

RE: S. 158

Dear Senator Baucus:

I will try to answer the questions in the order that you addressed them.

1. Do you believe that the question of human personhood is a medical and scientific question?

   By the very nature that a physician must act or not act is based on his medical and scientific knowledge. I believe that the question comes under the provence of medicine and science.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosphical, religious or political question?

   I believe that the question of human personhood is all of these. I think to conceive that a human life does not exist from conception is absurd. This would suggest that the creation of a human life was a discontinuous process and that at some point in time, the human personhood was conveyed on a biological organism.

3. Do you believe that medical and scientific data along can determine what the definition of human personhood should be in the present context?

   I believe that medical and scientific data is the best way to answer the question.

4. What, in your judgment, would be the impact is S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

   There is no doubt that the law would effect some hardships. However, I believe that the current laws governing human life create a far greater disservice to this country and its well being than the enactment of S. 158.

Please note my change in address.

Sincerely,

Robert E. Cleary, M.D.

REC:eh

University of Miami
Miami, Florida 33101

DEPARTMENT OF PEDIATRICS
P.O. Box 016960
Mailing Address School of Medicine (R-131)
Location Central Building Jackson Memorial Hospital

May 28, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Seperation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator:

Thank you for allowing me to express opinions regarding S.158. My concepts are as follows:

1) One definition of life may be the state of being able to replicate by cell division or another process. In this sense the conceptus is alive just as bacteria are.

2) There are no scientific methods to define what constitutes "human personhood" or when it occurs. This concept, therefore, becomes philosophical with obvious moral, religious and political implications.

3) All would agree that the viable newborn infant is a "human being". In my view (philosophical) the conceptus is not. One cannot determine when the change takes place. For practical purposes, I would adopt the view that the fetus should be recognized as having "personhood" when it has progressed to the point of being able to maintain extrauterine existence. This is of course the long accepted concept of the period of viability.

4) The enactment of S.158 would prove diastrous. Nowadays overpopulation of the world does not receive much publicity. In my opinion it remains the greatest problem of our society. A measure which seriously interferes with employment of important contraceptive measures is a "giant step for mankind"--backwards.

In Rosenberg's excellent presentation he points out that the real issue in S.158 is regulation of abortion. I am convinced that the judicious utilization of abortion serves a very valuable purpose. The effectiveness of amniocentisis for detection of genetic and other defects in the fetus is already established. Utilization of this technique coupled with termination of pregnancy clearly prevents birth of defective infants. To deny this choice to prospective parents by legislation will not serve our best interests. In my view the individual should also have access to abortion in untoward social circumstances as well.

Other adverse inpacts on modern medical practice would result from S.158. We do not when "personhood" begins--neither do we know when it ends. The patient who is "brain dead" is alive according to S.158 (in a condition of dependency). Terminating life support would no longer be legally possible. All of the advances of describing criteria for "brain death" would be in vain. Organ transplantation with its impact on saving of valuable life would be seriously compromised.

How can an enlightened society enact legislation which on the one hand obligates us to produce defective infants and at the same time compromises our ability to prolong valuable, clearly established life.

I hope these views are of value to you.

Sincerely yours,

William W. Cleveland, M.D.
Professor and Chairman

WWC/lv

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COLLEGE OF MEDICINE
OFFICE OF THE DEAN

June 4, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13 which reached my office on May 26. The questions posed by S.158 are very fundamental and I will do my best to give you some views on them.

I do believe that the question of human personhood is a question to which contributions can and should be made by physicians and biological scientists. However, these groups do not have any exclusive expertise in this area and, indeed, it could be argued that the training of a physician or a scientist does not directly bear on the question. Therefore, I do consider that the question has to be addressed also by ethicists, philosophers and religious leaders. All of these groups have an important and necessary contribution to the dialogue. Ultimately, the question may become a political one but it would seem that the dialogue at the present time is unduly diffuse. We seem to be far from a concensus and, therefore, it would be very difficult for clear guidance to be provided in a political arena.

It seems unlikely that a question which has exercised the greatest minds for thousands of years can be settled to everybody's satisfaction by legislative action by the present United States Congress.

There is no question that if S.158 is enacted, it will have significant impact on the practice of medicine. The most obvious will be the necessity to redefine the indications for abortion and I would suspect that these would become extremely few. Even the conservative indication of termination of pregnancy for the health of the mother is at risk, which would have to be reconsidered and reexamined. The implications here would be mainly in terms of expanding the services necessary for high risk obstetric care. Prenatal genetic screening procedures using techniques such as amniocentesis, of course, could still be performed although a redefinition of the status of the fetus would require a redefinition of the risk factors in such procedures. However, if these are essentially safe, it would seem appropriate that they could be continued. Naturally, the current option exercised in some places for termination of pregnancy would no longer exist. One of the main areas of difficulty would be in contraceptive techniques. Contraceptive procedures such as the use of barrier creams or materials or the use of estrogen prophylatics to prevent conception would remain legal. On the other hand, intrauterine devices or chemical interventions to prevent implantation could conceivably be regarded as illegal and destructive of life.

My overall feeling is that, although some readjustments in medical practice would be necessary as a result of S.158, apart from the dramatic decline in the number of abortions performed, the impact in medicine would be relatively small. In my mind, the issues are much broader and concern the deepest sensitivites of conscience and ultimate spiritual values. Politically, it would seem that the decision is whether or not a pluralistic society can legislate its behavior and morality.

Thank you for allowing me to respond on this important issue. I would be happy to amplify on these comments should you wish.

Sincerely,

Alastair Connell

Alastair M. Connell, M.D.
Dean

AMC/jm

Princeton University DEPARTMENT OF BIOLOGY
PRINCETON, NEW JERSEY 08544

May 4, 1981

The Honorable Senator Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am a research scientist specializing in the development of the vertebrate brain. I head my own laboratory here at Princeton University where I have been a professor of biology for the last five years. I have taught the Department's survey course in biology, as well as a more specialized course on the developmntal biology of nervous systems. I am, therefore, well-versed in a variety of biological areas ranging from genetics and reproductive physiology to the formation and function of the human brain. I am writing because I have been reading about the comments of my fellow scientists in the subcommittee hearings on Bill S158. I believe that there is a fundamental misunderstanding of the "biological" facts as reported by most of the scientists you have heard from to date.

It is certainly true that the human zygote is "alive." For that matter, so are the ununited sperm of which many millions are killed with every ejaculation. The unfertilized egg is also "alive." The potential for human life is lost every month by every woman who does not conceive within approximately 48 hours of the release of her ovum from the ovarian follicle. One can argue, of course, that the "fertilized" egg is different from the sperm and egg because it contains not one-half but rather the full genetic potential of a human being. However, a cancer cell, which medical technology spends millions each year trying to eradicate, also contains the full genetic potential of a human being. The same can be said for the mass of cells which compose the human placenta. This is discarded immediately after every "term" birth.

Arguments of this type are frequently dismissed as meaningless because it is obvious that the cancer cell and the placental cells are different from the fertilized egg. They would not normally go on to produce a complete human being. However, biologists expert in development now understand that the difference between the fertilized vertebrate egg and the other cells of the body is not in the genetic information of the nucleus but rather in the substances that surround that nucleus and evoke, in a highly ordered temporal sequence, the activity of specific groups of genes. The nucleus of a frog intestinal cell, for example, when placed into egg cell cytoplasm can go on to form a complete new frog. For mammalian zygotes, the evocation of full organismic potential depends on substances that derive from the cytoplasm of the fertilized egg and, within several days of conception, the substances necessary for the embryo's continued development and survival depend on the placenta and ultimately on nutrients from the pregnant female's blood stream. Thus, from a biological point of view, up until approximately 20 weeks of gestation, the developing mass of cells is no more an independent being than is a population of connective tissue or cancer cells in tissue culture. None of these human cells can survive on their own despite the fact that the nuclei of all contain the full genetic potential.

I submit, therefore, that one cannot define human life solely on the basis of the time when all the genes necessary to make a complete human being come together. That is, conception does not define the beginning of the unique human organism.

It would, in fact, be more appropriate for your committee to consider not the definition of "life," but rather the definition of "human." Here I believe you move into the area where neurobiologists and not geneticists are most knowledgeable: the definition of human necessarily implies the presence of a functioning human brain. I have spent 11 years engaged in research on vertebrate central nervous system development. I will unequivocally state that a functioning human brain does not exist at conception. Furthermore, even the brain of the human embryo does not contain the nerve cells and connections necessary to perceive the sensory world or form any appropriate responses to it.

It would be very satisfying and, in fact very less wasteful of the taxpayer's money, if we as scientists could tell lawmakers with certainty exactly what time the fetal brain crosses the developmental threshold and becomes capable of supporting human consciousness. This then would be the point to call the beginning of human life. Unfortunately, we cannot do this. Our knowledge of the developmental mechanisms and cellular interactions that produce the crucial neural circuits simply has not yet reached that level of understanding.

Please recognize that the only scientifically valid means of defining the onset of human life is exactly the same as the means now used to identify its end. The medical profession defines death as "brain death," the time when the human brain is damaged beyond the hope of supporting a sentient human existence. The onset of human life should, likewise, be defined no earlier than the time when the fetal brain has an equivalent chance of supporting a sentient human being. This moves the controversy on the "beginning of human life" back to the question of when should the developing fetus be considered a human infant and, consequently, when should all efforts be made to preserve and protect that human life. Most will agree that this time occurs before birth but all responsible scientists will also have to concede that it has not yet happened at conception. It would, therefore, seem wise to refrain from any federal legislation that would set an erroneous time for this event.

Yours truly,

Martha Constantine-Paton
Associate Professor of Biology

MCP:bl

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• DEPARTMENT OF PEDIATRICS
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(212)270-1625

June 5, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus,

In response to your letter of May 29th and your specific questions:

Question 1: I very strongly believe that the question of human personhood is not a medical or scientific question but a philosophical/moral/ethical/ and religious one and as such is one that should not, indeed, cannot be fairly and practically legislated.

Question 2: I believe I have answered this in the affirmative in #(1)above.

Question 3: As indicated in #(1) above, human personhood must be defined by individuals in the light of their personal beliefs and cannot possibly be established by medical/scientific data.

Question 4: I believe that the passage of S.158 would have a most detrimental effect on the rights of women (and their husbands), on the physician-patient relationship, and on the ability of physicians to be able to provide the optimal care now possible for women, for families and for unborn children.

Sincerely yours,

Charles D. Cook, M.D.

Charles D. Cook, M.D.
Professor and Chairman
Pediatrician-in-Chief
State University and
Kings County Hospitals

CDC:ef

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-4 AM 10 52

April 28, 1981

Honorable Max Baucus
U.S. Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to express my concerns about S.158, the so-called "Human Life Statute". As a physician and medical scientist I reject the notion that it is possible to determine the moment of establishment of human life. As a medical educator, I consider the attempt to legislate this decision as intellectually offensive.

The point of distinction between the biological concept of fertilized ovum and the social concept of meaningful life is a matter for philosophers and theologians. As such it is subject to difference of opinion, all sincere, all moral, and all honest. To statutorily determine this matter is to discriminate against the legitimate ethical judgement of a very large proportion if not the majority of the American population.

I hope the Senate Judiciary Committee Subcommittee on Separation of Powers does not recommend the "Human Life Statute".

Yours truly,

Morton C. Creditor

Morton C. Creditor, M.D.
Interim Executive Dean

MCC:ld

UNIVERSITY OF MARYLAND
SCHOOL OF MEDICINE & HOSPITAL

OBSTETRICS & GYNECOLOGY

OFFICE OF THE CHAIRMAN
(301) 528-5966

June 12, 1981

Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I apologize for being tardy in answering your letter of May 13, 1981, however it was sent to my old address at The Duke University School of Medicine.

I will be delighted to answer your questions.

1. The question of human personhood is not a medical or scientific question.
2. The question of human personhood is rather a philosophical, religious and political question.
3. Medical and scientific data cannot define human personhood.
4. The impact of the Bill S. 158 would be disastrous for women, children and society as a whole. The increased birth rate would totally overwhelm the current obstetric facilities and neonatal facilities present in this country at this time. This would lead to inadequate care of women and their newborn children. In addition, the number of women seeking illegal abortion would skyrocket leading to an unbelievable increase in morbidity and mortality of women. Our present generation of Obstetrician Gynecologists have not had the opportunity of learning how to clinically manage septic abortions. Genetic screening programs that are really in their infancy at this time, would be abolished. The use of intrauterine contraceptive devices would have to stop, further increasing the birth rate in this country. To summarize the birth rate, the maternal mortality rates, the fetal mortality rates, the neonatal morbidity and mortality rates, the infant death rates and the congenital malformation rates all would skyrocket leading to a tremendous increase in medical costs.

22 South Greene Street / Baltimore, Maryland 21201

Senate Bill 158 is objectional to me in that chapter 101 section 1 states "congress finds that present day scientific evidence indicates a significant likelihood that actual human life exist from conception." Whereas the conceptus indeed is living tissue, from the time of fertilization it is living only in comparison to a malignant tumor. Like a malignant tumor, the conceptus sometimes kills its hosts. Like a malignant tumor, the conceptus is a parasite. Like a malignant tumor, the conceptus cannot live outside of the mother's body. Only after 23 to 25 weeks following conception is the conceptus unlike a malignant tumor, that is only at this time is life outside of the mother possible.

I know of no Obstetrician Gynecologist who enjoys doing therapeutic abortions. Only those of us in clinical practice prior to the late 1960s, however, fully understand the medical, social, and psychological impacts that an unwanted pregnancy have upon women and their families.

As a practicing Obstetrician Gynecologist and as a citizen of this country, I object very strongly to Senate Bill 158.

Very sincerely,

Carlyle Crenshaw Jr

Carlyle Crenshaw, Jr., M.D.

CC/at

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Department of Pediatrics

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June 3, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your letter of May 13, 1981, I am glad to give you my opinion concerning the questions that you have raised.

1. "Personhood" does not have a medical or scientific definition.
2. "Personhood" is a philosophical and religious concept with political aspects.
3. From the above, it is clear that medical and scientific data cannot define "personhood."
4. The enactment of S.158 would have a drastically unfavorable effect on the medical care that we deliver to our patients at Bellevue and University Hospitals. The former serves a low-income group and the latter a middle and high income group.

Prior to liberalization of our approaches to contraception and abortion, over one-third of the beds on our gynecology service were filled as a result of improperly performed illegal abortions. Maternal life was at risk and hospital services were strained. These cases have virtually disappeared but can be expected to reappear with the enactment of S.158.

Genetic screening will become useless. Women at risk of genetically damaged infants will be returned to gambling against odds.

Teenage pregnancy is an increasing medical and social problem. Our ability to help these youngsters will be seriously impaired.

It would be possible to expand on the potential harm that will be done by S.158. The message seems to be sufficiently clear.

Sincerely,

Joseph Dancis, M.D.
Professor and Chairman

rf

DEPARTMENT OF PEDIATRICS
(803) 792-2111

1981 JUN -4 AM 11: 10

Medical University of South Caroli
171 ASHLEY AVENUE / CHARLESTON, SOUTH CAROLINA 29425

May 27, 1981

Senator Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am writing you in response to your letter of May 13, 1981 soliciting my opinion as a medical expert concerning the proposition that human life begins at conception. Actually, the interpretation of what is a living human being seems to be a philosophical or religious question that can be interpreted in a number of ways. The actual egg and sperm are living before conception takes place and the cellular mass which begins the formation of the fetus never stops living. Many months pass before the small cellular mass transforms into what I interpret to be a living fetus. To pass legislation or laws to govern the populace based on someone's religious philosophy I would think would be a dangerous precedent. Population control is a great salvation to civilization and as a pediatrician I feel that families should have the right to have abortions rather than impose hardships on themselves or to enter into an environment which they are not wanted and welcomed.

Medical and scientific data alone cannot make the definition of human personhood. Only human beings through their own moral convictions can create such an arbitrary boundry. I think that S158 would have a tremendous impact on the practice of medicine and genetic screening. I have practiced medicine in the pre-abortion era and have had many young girls that have had their lives seriously effected by an unwanted pregnancy and/or a criminal abortion. I have also lived through the era to see many advances in genetic screening and welcome such activity and abortions when indicated to prevent terrible deformaties. I think such a law would impose religious constraints on a group of the population that feel their right to have an abortion is theirs and should not be

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taken away again by an unnecessary law. If someone feels that abortion is wrong they should have a right to refuse an abortion, but they have no right to impose their beliefs on others. I can foresee that the out of the country abortion business and the criminal abortion business would again boom forth. Unfortunately, such a system favors mostly the affluent and it is the affluent who are probably the least in need of abortion services.

I devote my time to the care and management of children and teenagers and I believe in my product. I believe that a young teenager who makes a mistake and becomes pregnant should not be denied an abortion and forced to carry her child to term. It is so rewarding at the present to be able to offer this child and her family the alternative of a legal abortion under competent medical personnel. It is wrong because of someone's moral convictions that this girl should be deprived. I support liberalized abortion and I feel it is unjust that the laws have taken this service away from the economically disadvantaged. Thank you for this opportunity to express myself on this matter.

Sincerely,

CP Darby

C. P. Darby, M. D.
Professor and Interim Chairman

CPD:kw

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SCHOOL OF MEDICINE

Please address reply to the undersigned at
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SAN FRANCISCO GENERAL HOSPITAL
SAN FRANCISCO, CALIFORNIA 94110

June 4, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

Thank you for giving me the opportunity to comment on the common and proposed human life statue† (S-158). I feel that I'm well qualified to reply to the questions you pose by virtue of my long experience in the field of maternal health. I have studied the health effects of abortion and have taught maternal health at the Harvard Medical School, the Harvard School of Public Health, the University of Oregon, and, presently, at the University of California in San Francisco. I will address the questions you posed in order:

1) I do not believe the question of human personhood is a medical and scientific one. We have long known when conception occurs, but whether conception constitutes human "life" or personhood is strictly a moral and theologic issue.

2) The question of human personhood is a moral, ethical, philosophical, religious, and political one and cannot be answered by medical or scientific research.

3) Medical and scientific data cannot help us determine the definition of human personhood or when human "life" actually begins.

4) I believe the impact of S-158 on the health of America's women and children could be disasterous. Abortions will occur even if they are illegal. They will, however, be exceedingly expensive in terms of emotional, health, and economic costs. Our hospital beds will again be occupied, as they were before abortion was safe and legal, by women suffering the horrible consequences of non-medical procedures. Women will be forced to bear unwanted children and even children who are known to be horribly deformed or incurably ill prior to their birth. It is conceivable that this Bill will make it impossible for couples to use the safe and effective birth control methods that are now available to them. If these methods cannot be used the demand for abortion will actually increase and the consequences of its illegality will be even more destructive than they were prior to the liberalization of abortion laws in our country. Compassionate physicians may, of course, choose to ignore prohibitions against safe abortion and contraception. Our already over-burdened legal system may then be crowded with physicians and their patients who are

conscientious objectors to this law.

Thank you again for giving me the opportunity to comment.

Sincerely,

Philip D. Darney, M.D., M.S.C., FACPM, FACOG
Associate Professor of
Obstetrics, Gynecology,
& Reproductive Sciences
University of California, San Francisco

PDD/sw

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Developmental Disabilities Service
Genetic Counselling Program
March of Dimes Birth Defects Center
Nassau Cleft Palate Center of NSUH

(516) 562-4610

1981 APR 28 AM 9 41

April 23, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of April 16, 1981 re: the Senate hearings on S. 158.

I believe that the determination of when life begins or exists should not and cannot be legislated.

While it is true that scientists' and members' of the medical professions primary interest is biology or the study of life and of living things, Mr. Helms' bill, S. 158, is not concerned with molecular or biochemical functions. It speaks about the concept of human personhood and states it exists from the moment of conception. If this is so, I do not understand how Mr. Helms and his supporters can distinguish the so-called "humanity" of a fertilized egg, a gastrula or a primitive streak stage in embryogenesis from the "humanity" of a viable sperm or egg. All are metabolically active and communicate on a molecular level.

It appears that what is under consideration then is not a biologic question but rather a philosophical one. I believe that the author of the bill is talking about a definition of what constitutes a human being and implies that human personhood includes the possession of the divine spark or soul as well as the ability to reason, etc. If this is what the author intended then the question definitely has religious, moral and ethical considerations. It has poetic and literary implications as well.

However, at the present time, there is no way that anyone--scientist, philosopher, theologian, ethicist, poet, or legislator can determine when human life or personhood begins. Therefore, I believe that everyone is entitled to his or her opinion on this question but find it incredible that a subcommittee of the United States Congress would spend time debating this particular issue.

Lastly, it is clear that the author intends to use this issue as a means to chip away at the already legislated constitutional right of all women to have access to abortion. I object Mr. Baucus. Mr. Helms is playing dirty pool.

Sincerely yours,

Jessica G. Davis, M.D.

Jessica G. Davis, M.D.
Director, Child Development Center
Chief, Division of Genetics

JGD:mm

cc: Neil Holtzman, M.D.
Leon Rosenberg, M.D.

UNIVERSITY OF MARYLAND
SCHOOL OF MEDICINE

OFFICE OF THE DEAN

June 4, 1981

The Honorable Max Baucus
United State Senate
Washington, D. C.
20510

Dear Senator Baucus:

I am responding to your letter of May 13, 1981, concerning the evaluation of S.B. 158. I will try to respond to your questions in the order in which they were raised in your letter.

1. Yes. I believe the question of human personhood is a medical and scientific question.

2. No. I do not believe that the question of human personhood is a part of a moral, ethical, philosophical, religious or political question. I realize there are many individuals who try to make this question a part of one of these many issues, but in reality life is life and death is death.

3. Yes. I believe that medical and scientific data alone can determine the definition of human personhood, irrespective of the context.

4. In my judgment S.B. 158 would impact heavily upon the issue of abortion. Abortion would again presumably become illegal and I personally believe they would decrease in number and that in itself may increase the philosophical, ethical and political questions raised above. Genetic screening would be increased as it would probably be the basis for the continuation of legal abortions. The use of contraceptives I do not know, but suspect there will be very little change because, as you know, there have been no great results from family planning among many people in this country.

I hope this response is as complete as you desire.

Sincerely,

John M. Dennis, M. D.
Vice Chancellor for Health Affairs
Dean, School of Medicine

JMD:po

THE UNIVERSITY OF NORTH CAROLINA
AT
CHAPEL HILL

Department of Pediatrics

The University of North Carolina at Chapel Hill
Clinical Sciences Building 229 H
Chapel Hill, N.C. 27514

June 8, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of
  Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

This is in answer to your letter of 13 May 1981 regarding the hearings on S. 158. My answers to the questions that you have raised are as follows:

1. Do you believe that the question of human personhood is a medical and scientific question? My answer to that is "no."

2. Is it your veiw that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? The answer to this question is "yes."

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? The answer to this question is "no."

4. What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other? If S. 158 is enacted, in my opinion, the impact will be absolutely catastrophic in all areas. It will not be possible for those of us who practice medicine to offer to our patients the fruits of our scientific labors for many, many years. It will render the whole question of genetic screening almost to a laughing matter. Finally, from someone who has worked for many years in Pediatrics, I cannot emphasis strongly enough how important I feel it is to offer mothers the alternative of aborting fetuses which are unwanted, defective or which could not be cared for adequately because of social, economic or emotional reasons. I urge you and your Committee to do everything possible to see that S. 158 is not enacted.

Sincerely yours,

Floyd W. Denny

Floyd W. Denny, M. D.

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OF THE CITY UNIVERSITY OF NEW YORK

Mount Sinai School of Medicine • The Mount Sinai Hospital

R. J. Desnick, Ph.D., M.D.
Arthur J. and Nellie Z. Cohen Professor of Pediatrics and Genetics

(212) 650-6944

May 26, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Unites States Senate
Washington, D.C. 20510

Dear Senator Baucus,

In regard to your letter of May 13, 1981 requesting my evaluation of Senate Bill 158, let me respond to each of your questions.

1, 2) I do not believe that the question of human personhood is a scientific or medical question. In my view, it is a question which cannot be answered by the scientific method, but lies in the area of moral, ethical, philosophical and religious thought and conjecture. It is not a question that can be decided politically or by legislation.

3) I am not aware of any scientific or medical data, new or old, which bears on the question of human personhood; specifically, I do not know of any scientific or medical data that bears on the question of when actual human life exists.

4) As a medical scientist, a human geneticist, and a devoted American, I would judge that the enactment of S. 158 would have a far reaching impact on the health and interests of the American people. This bill is designed to prohibit the use of certain contraceptive devices which a great number of our female citizens have chosen to use. In addition, it would preclude the option of prenatal diagnosis for an ever-increasing number of disorders. There is no cure for these devastating diseases which bring suffering to the affected individuals and their families.

Moreover, I strongly concur with the statement made by Dr. Leon Rosenberg at the April 24th Senate hearings on this bill. I also feel that our society should continue to "accept a pluralistic view which makes women and couples responsible for their own reproductive decisions . . . " We must maintain the right for our citizens to make their own decisions with regard to abortion. We should recognize that each individual and couple must have the opportunity to independently make this decision in the context of their personal, ethical, religious, philosophical and moral convictions.

I hope my comments are helpful in your evaluation.

Sincerely,

R.J. Desnick
Professor of Pediatrics and Genetics
Chief, Division of Medical Genetics

RJD/bv

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1981 APR 27 PM 12: 12

April 21, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator:

Thank you for your inquiry of April 14, 1981. I am very much interested in this subject and am delighted to be asked to respond.

To answer your specific questions, I do not believe that human personhood is a medical or scientific question. I think that medicine and science might be used to advise in this issue, but that this is a moral, ethical and religious issue which has no finite basis in either medicine or science. In other words, I think the proposal probably infringes on religious freedom. The question of human personhood being a political decision is easy to answer. This is no place for politics to enter in other than through guarantee of due process in our decision making. The problem is very definitely a religious, ethical or perhaps moral or philosophical one for which there may be political as well as medical or scientific advice. However, they cannot all three be mixed.

I agree that medical and scientific data alone do not determine the definition of human personhood. If I were to use only medical or scientific criteria, I would have to set the onset of personhood at some time after the middle of pregnancy, i.e., after 20 weeks gestation and fairly close to 28 weeks gestation. Practically speaking, survival of the intact human does not occur prior to 20 weeks and is rare up until 24 or 26 weeks of gestation, dated from the onset of the last menstrual period.

I know that the issue is a very emotional one and that there are very deep seated feelings on all sides of the question. I also know that it is a very fundamental one to both the very makeup of our society and our consequent actions and reactions. It is probably even more fundamental in the sense that it impinges directly on the practice and teaching of my specialty, Obstetrics and Gynecology. My best advice is that given above. I do hope this has been helpful and look forward to seeing your proceedings.

With kind regards,

Sincerely,

PVDilts Jr.

Preston V. Dilts, Jr., M.D.
Professor and Chairman

PVD/amt

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Department of Obstetrics and Gynecology

1981 APR 27 AM 9 12

April 23, 1981

Hon. Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I do indeed have concerns over S. 158. There are constitutional issues involved, and the bill will affect moral and clinical aspects of medical practice.

Evolutionary biologists and developmental biologists have detailed knowledge concerning living matter. There is currently a rapid expansion of information concerning the molecular basis of genetic control and function. This information stresses biologic activity as a continuum. Fertilization is not an event of instantaneous creation, repeated a billion times a year, but a step in a developmental sequence involving genetic material of immeasurably ancient pedigree. It is truly said that the future of the human race resides in the testes and ovaries of people now living, which contain the genetic blueprints. When I remove an ovary in the operating room, is this a surgical Holocaust of several hundred thousand potential persons? Clearly, this will not do.

Science provides no factual identification of personhood, and it cannot be said that a zygote has any more claim to be called alive than an egg or sperm; only that it has different developmental properties, a new direction of development as a result of fused genetic material.

The medical aspect of the question is less clearcut. There are outspoken opponents of S. 158 who would have it that there is no moment, specifically defined, when human life, as indicated by personhood, can be medically determined to begin. I am not entirely comfortable with this view. Concern for human life is a central part of the physician's ethic, but few doctors could profess this convincingly while denying their ability to say when this concern should begin. Most would speak of viability, a stage of development when the immature or premature fetus could survive detached from the mother, with every available life support system. This clearly does not reach to the definition proposed in S. 158. Before viability, citizens including physicians will have their views, based on moral, ethical, philosophical and religious convictions.

Above all, one may question the propriety of attempts to establish this definition by legislative or statutory means. It is difficult to think of a parallel, but I am reminded of the serious medieval controversy over how many angels could dance on the head of a pin. I don't recall how that one came out, but at least no one called for scientific measurement of pin surface, or inquired about shoe size of angels.

Yours sincerely,

Gordon W. Douglas, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
New York University School of Medicine

GWD:lg

June 5, 1981

The Honorable Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Baucus:

RE: S. 158

I am in receipt of your letter of May 13, 1981,requesting information with regards to pregnancy termination and its impact on the scientific community.

I personally am opposed to the legislation proposed in the Senate, Bill S.158. The item that impacts most directly on my practice of medicine is the inability to perform an abortion on a fetus, which has been proven by genetic analysis to be abnormal. To me, viability, or human life is reached somewhere between weeks 24 and 28 of pregnancy, since babies born after this time have a reasonable expectation of survival given the proper environment.

I view with serious concern Senate Bill-158, also having an impact on intrauterine contraceptive devices.

While everyone will admit that we do not have a perfect contraceptive at the present time, the uterine device constitutes one of our most fundamental and basic tools for Family Planning. It probably works by preventing implantation of the fertilized egg in the lining of the uterus. Under the terms of S-158, this would be prohibited.

I am further concerned by such instances of distinct and real risk to the mother, if the pregnancy is continued. Example of these conditions would be heart disease, diabetes, high blood pressure, etc. In certain women with advanced stages of these conditions, continuation of the pregnancy would constitute a real and distinct threat to her life. Therefore, I feel that the S.158 Bill would interfere with my practice of medicine. I might parenthetically add, that I am a Protestant physician and while I loathe doing elective abortions, I do not think that they all ought to be prohibited. An abortion, simply because it is inconvenient for a woman to bear a baby, is not within my scope of acceptance. However, a woman who has been involved with incest rape, or any of the medical conditions I have mentioned, I believe firmly, should be entitled to an abortion under the laws of the United States of American.

Continued

All-in-all, I view this legislation with extreme, grave apprehension and feel that it would be an undo intrusion on the practice of medicine; whether he or she be a Protestant, Jewish or other physician. The Roman Catholic physician is about the only person I can think of at this time, who would be directly in favor of this legislation.

There are certain situations where a woman should be entitled to receive an abortion, as cited above, and I feel comfortable in recommending this to the Congress.

I am sorry that I have been so wordy in this correspondence, but this is obviously, not a simple matter. It involves a great deal of thought and discussion by all parties concerned.

If I can be of any further help to you, please do not hesitate to let me know.

With kind personal regards.

Sincerely,

John L. Duhring, M.D.
4411 Woodbriar Drive
Toledo, OH 43623

408 Vista Flora
Newport Beach, CA 92660
May 4, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

It is unfortunate that enormous man hours are spent on the definition of personhood when the issue is raised by a group using a legislative fiat to interfere with a family's reproductive options--contraception and therapeutic abortion.

The definition of human personhood cannot be simplistically defined as "at the point of conception". There are multi-layers of personhood--biologic, moral, ethical, philosophic, legal and religious. There is a degree of similarity to the dilemma faced by parents when an infant is born with ambiguous external genitalia. At that point, assignment of sex must be carried out based upon biologic characteristics such as the appearance of the infant's external genitalia, internal genitalia, the chromosomes, and dependent upon a number of social and philosophic parameters such as social or functioning sex or filial sex. There is no simple method to assign sex when ambiguities occur. Is this to be resolved by legislation? It cannot be. Whenever these highly charged biologic, philosophic, legal, religious dilemmas arise, each must reach his/her own considered opinion.

For centuries, serious scientific, religious, legal and moral discussions have not resolved the question of personhood. I urge you to oppose this legislation for the question cannot be answered and the hidden agenda, namely to interfere with contraception and termination of pregnancy, is each family's own decision--not one to be imposed by any institution.

Respectfully yours,

KWDumars

Kenneth W. Dumars, M.D.
Professor
Department of Pediatrics
Chief, Division of
Developmental Disabilities
and Clinical Genetics
University of California, Irvine
College of Medicine

KWD:jvl
cc: Neil Holtzman, M.D.

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June 12, 1981

The Hon. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your recent communication concerning S.158.

The Bill poses questions that are not easily resolvable. When does human life begin? Does the joining of two undifferentiated cells constitute human life? In my opinion we are dealing with a philosophical question as well as a medical and scientific question.

You might find a corollary in the question, when does human life cease? When has death occurred? This question was debated for several decades. It is possible to keep a human being "alive" in the presence of a brain incapable of sustaining life, by supporting ventilation with a respirator and the heart and circulation by the infusion of drugs. Patients can be kept alive for weeks under such a regime, yet if those two support systems are turned off, the heart would cease to beat immediately. This led to the definition of "brain death" as being equivalent to death. Now, if there is evidence that the brain is non-viable, most individuals will accept the fact the patient has indeed died.

To go back to the other end of the spectrum, when does life begin? If we compare what has been said in the paragraph above with what happens after conception, life cannot be assumed to begin if there is no reason to believe it would continue to survive without support systems,in this case the maternal blood supply to the fetus protected in utero. As a matter of fact, only a rudimentary brain appears by several months. How then can we say human life has begun when there is no evidence of the existence of a controlling center for life, namely a brain? From my point of view, speaking both scientifically and philosophically, I should think one would attempt to fix the approximate date when a fetal brain exists as the date after which life has begun. I do not see how we can fail to equate the evidence of "brain death" with human death on the one hand and on the other positive evidence of the structural existence of a human brain as a beginning of life.

I hope you will find these observations of some benefit. You and your committee have my sympathy because as you point out this is an extremely complex problem and one with a potential devastating impact upon the medical community.

If I can be of further help, please let me know.

Sincerely yours,

James E. Eckenhoff

James E. Eckenhoff, M.D.
Dean

JEE:pc

ALBERT EINSTEIN COLLEGE OF MEDICINE
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1981 JUN -4 PM 11: 13

OFFICE OF THE DEAN

June 2, 1981

PHONE (212) 430-2801

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Honorable Baucus:

I am pleased to have the opportunity to give you my thoughts concerning a number of issues related to legalized abortion. I will respond specifically to the four points raised in your letter.

1. It is very clear to me that the issue of human personhood is not a medical and/or scientific question. A fertilized ovum is a living cell and has the potential of becoming the ancestor for an independent human being. It is clear that the fertilized ovum is a special kind of cell. It is also clear that a newborn infant is a person. The debate as to when a cell or a group of cells takes on the characteristics of a person will never be answered satisfactorily.

2. The definition of human personhood is totally philosophical.

3. The definition of human personhood cannot be based at all on medical or scientific data. These data can determine for example, when brain function begins, when cardiac function begins, and when life independent from the mother can be sustained. In my judgment, none of these has any bearing on the issue of human personhood.

4. If S.158 were enacted, its effect would be to legislate tragedy. Certain forms of contraceptives would become illegal, with obvious consequences. Programs of prenatal diagnosis, which permit early termination of pregnancies in which the fetus is seriously and irreversibly affected, would be halted. This legislation would represent an enormous step in the direction of removing from women their personal freedom in making decisions about medical matters.

To legislate that human life exists from the moment of conception is an obvious attempt to do away with all abortion programs. The debate is focused on the wrong issue. There is no way in which one can decide conclusively when the embryo becomes an actual human being. The issue is whether or not women have the right to control their own reproductive functions. On that issue, society will have to reach a consensus based on philosophical considerations alone.

Sincerely,

Chester M. Edelmann, Jr., M.D.
Associate Dean
Professor of Pediatrics

CME:jm

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CB2 3EG

1981 JUN -4 AM 11: 29

28th May, 1981.

Senator Max Baucus,
United States Senate,
Washington, D.C. 20510,
U.S.A.

Dear Senator Baucus,

Thank you for your letter of April 30th, regarding the proposed legislation on human personhood. I have looked closely at the Bill that you so kindly sent. I can only comment on the first three lines of it, i.e. the sentence:- "The Congress ~~finds~~ that present day scientific evidence indicates a significant likelihood that actual human life exists from conception".

I have to make assumptions about the meaning of the phrase "actual human life". I understand from this that the legislators mean the development of a human form and personality during the early development of the foetus, through birth, and as the individual matures and grows throughout his life. Any definition of actual human life is bound to be complex, because life may encompass an organism, a tissue, or even a single cell. I will assume, briefly for the purpose of this letter that we are here concerned with development as I have just defined it, to include all the traits and characteristics of the physical, personal and spiritual nature of a human being throughout his life.

I could not agree with the sentence as written. There are far too many exceptions to the idea that human life begins with conception. Some of the exceptions arise before conception occurs, others arise after fertilization. Indeed, it would be very difficult to decide that any single fertilised egg contained all the properties we inherit in an individual, and that they would not be modified during later growth in utero.

I would like to detail briefly some of the reasons for diasgreement. Let me first start by outlining some of the events occurring before conception that can have a profound influence on human personality. One of the most serious conditions that can arise in our children is Down's syndrome, previously referred to as Mongolism. This arises through the presence of an extra chromosome in the child, and the consequences are familiar to us all. The events which cause this situation to arise actually take place before fertilization. They may even take place many years before fertilization occurs, when the tiny egg cell is being formed in the mother. A similar situation also applies to many other forms of chromosomal imbalance, which lead to equally disastrous results and, most often, to the abortion of the embryo.

Likewise, other essential events occur before conception which determine the ability of the embryo to develop in any particular way. The whole nature of development is preprogrammed in the egg as it lies in the ovary before it is ovulated. Without careful specification of shape and form, coded in the proteins and nucleic acids of the oocyte, the foetus would not form after fertilization. The events occurring before conception are so essential to later growth that they must be considered absolutely vital in defining the elaboration of a human being.

I would like to make a third point about the events before conception. We know many embryos can be activated to divide without fertilization. Such embryos can lead to fairly advanced forms in animals, and they probably occur too in man. In this case, there is no conception as we understand it. There is no spermatozoon, the egg merely starts to grow itself, and all its inherited characteristics from the oocyte that I have just described are sufficient to carry it through to an early recognisable form of life.

There are also many events occurring after fertilization which have pronounced effects on the individual, both physically and mentally. In some fertilised eggs, the contribution from the mother is excluded, so that the embryo develops as a copy of the father. This form of development is disastrous, and leads to the death of the foetus as pronounced pathological changes occur in it. This form of development essentially arises after the time of fertilization, and would thus deny the statement at the beginning of the Bill.

Identical twins arise through the division of an embryo. The timing of division can occur up to several days after fertilization has occurred. If it arises three or four days afterwards, then identical twins, triplets, quadruplets, etc. are produced. If it arises later still, the result may be conjoined twins. Twins, triplets, etc. arising from a single egg will all be similar, and in effect a single fertilization has given rise to several offspring. I cannot equate this situation with the statement made in the Bill, that actual human life arises at conception. In the case of twins, several lives have arisen at a later date than fertilization.

Some events occur later in gestation, and profoundly influence the human being. In twin pregnancies, one twin may die, yet some cells may be incorporated into the remaining twin. As a result, the embryo then develops as a mixture of two types of cell, and we call this a mosaic. Mosaic foetuses thus inherit two cell lines, as a consequence of events occurring long after fertilization. The results may be disastrous, interfering with the normal differentiation of sexual organs, and so having a pronounced effect on the characteristics of the child as it grows. This situation cannot be equated with the only statement made in the Bill.

I have outlined these conditions briefly in order to draw your attention to some of the situations arising during human conception. You will see that there are events both before and after fertilization which, in my opinion, negate the statement made about actual human life existing from conception. I have only listed some examples; there are others which I could quote if necessary. I trust this information is of help, and I will clarify any of these points should you require me to do so.

Yours sincerely,

R.G. Edwards

UNIVERSITY OF CALIFORNIA, SAN FRANCISCO

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SCHOOL OF MEDICINE
DEPARTMENT OF PEDIATRICS

SAN FRANCISCO, CALIFORNIA 94143

April 24, 1981

The Honorable Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your letter of April 16, inquiring about my thoughts on S. 158. As you know, I am a human and medical geneticist and have had considerable experience both with human genetic disorders and with experimental studies in early mammalian development.

I do not believe that science or medicine can define when human life begins in terms of when one actually becomes a person. It would do violence to semantics and to reason to claim that following fertilization the embryo is not a living organism. However, in this context the use of the term "living" is the same as would be applied to any mammalian cell which is maintained in a state which permits it to metabolize, respire, and proliferate. In this sense, cells which are taken from a human and placed in cell culture have the characteristic of being alive. Nevertheless, such cells would never be given the status of personhood, and therefore it is evident that "living" and "human life" in the sense of representing a human being as we understand it are not synonymous.

I personally know of no scientific or medical method for determining at what state a developing embryo acquires the qualities which would make it a person. Therefore, the legislation under consideration cannot be supported by such evidence, and any decision made in this regard will have to be based on other considerations. I personally feel that the Supreme Court wisely avoided attempting to make such a determination and feel that the Senate of the United States should do so as well.

With best wishes.

Sincerely,

Charles J. Epstein, M.D.
Professor of Pediatrics and Biochemistry

CJE:mjf

INDIANA UNIVERSITY
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1100 WEST MICHIGAN STREET
INDIANAPOLIS, INDIANA 46223

DEPARTMENT OF
OBSTETRICS AND GYNECOLOGY

June 2, 1981

The Honorable Max Baucus
United States Senate
Subcommittee on Separation of Powers
Washington, DC 20510

Dear Senator Baucus:

We, the undersigned members of the Department of Obstetrics and Gynecology of Indiana University School of Medicine, wish to testify in regard to S.158, Senator Helms' "Human Life" bill to amend the United States Constitution.

We believe that human personhood is a matter of medical importance but that its exact beginning has not been scientifically determined. The recommended legislation, defining human personhood as existing from the moment of conception, and providing equal rights to the zygote, blastocyst, embryo, fetus and those already born will lead to absurd, unconscionable and probably unenforceable medical and legal conclusions and ramifications.

Some examples follow:

1) A diseased uterus, tubes and ovaries are removed from a woman one day following an unsuspected, undiagnosable conception.

2) An unruptured tubal pregnancy is diagnosed and surgically removed before the woman dies of hemorrhage.

3) By ultrasound or amniocentesis testing a woman is found to bear a fetus with an abnormality incompatible with more than hours or days of extra-uterine life (eg. anencephaly). Her pregnancy is terminated in order that she may plan a better one.

4) A woman desires a reliable method of contraception rather than risk unwanted pregnancy and need for an abortion. She chooses an I.U.D. or low-dose oral contraceptive method, either of which may sometimes act by preventing implantation of a fertilized ovum.

5) In early pregnancy a woman begins to cramp and bleed. Ultrasound studies show an empty gestational sac (no fetus), but the placenta continues to elaborate hormones. A dilatation and curettage is done to stop her hemorrhage.

6) A woman has a benign cystic teratoma of an ovary, likely having resulted from parthenogenetic "conception." This tumor or its malignant counterpart is surgically removed.

7) A woman has a hydatidiform mole (an unusual but not rare placental growth, usually without a fetus, but resulting from conception) and it is surgically evacuated before she dies from hemorrhage, toxemia or infection.

8) Following a hydatidiform mole the conceptus goes on to develop into a choriocarcinoma (a highly malignant and lethal cancer derived from the conceptus, which with modern chemotherapy is at least 90% curable). The clusters of tumor in her lungs and uterus are totally killed by drugs.

9) A woman has a menstrual period and throws her pads away.

In each of the above few examples of many, someone would be breaking the law if the conceptus is considered a human person. In all examples but the last, the doctor and his patient would be guilty of murder or accessories to such a crime. In the last example, often representing early spontaneous abortion, the woman has disposed of a dead human person without notifying legal or public health authorities.

In many states a human person is considered legally dead if there is no evidence of brain activity. Are we now to endow human personhood to a brainless fetus (anencephaly) or to a few still undifferentiated cells?

We strongly believe that the definition of when human personhood begins should remain within the speculative domain of religion and philosophy.

We urge you not to approve S.158 or any similar legislation which would make ludicrous our constitution and wreak havoc on our public health.

Respectfully yours,

Clarence E. Ehrlich, M.D.
Professor and Acting Chairman

Robert E Rogers
Robert E. Rogers, M.D.
Professor

Robert A. Munsick
Robert A. Munsick, M.D., PhD.
Professor

Joseph F. Thompson
Joseph F. Thompson, M.D.
Professor

JW Pearson M.D.
Jack W. Pearson, M.D.
Professor

William Ragan
William D. Ragan, M.D.
Professor

Lillie Mae Padilla MD

Lillie Mae Padilla, M.D.
Assistant Professor

Frederick B. Stehman, M.D.
Assistant Professor

Sprague H Gardiner

Sprague H. Gardiner, M.D.
Professor

Peter C.M. Young, PhD.
Associate Professor

Richard A. Meiss

Richard A. Meiss, PhD.
Associate Professor of
OB-GYN and Physiology

cc: President Ronald Reagan
Senator Jesse Helms
Senator Richard Lugar
Senator Dan Quayle

RAM:cg

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Medical School
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Division of Neonatology

(512) 691-7118

September 8, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Mr. Baucus:

I am responding to your letter of May 13, 1981 with my personal opinion as a medical professional. I consider this issue a very important one since my life's work has been devoted to children, particularly very tiny babies. I will give specific answers to your questions and then give some of my view of the problems. First the answers to the questions.

1. Do you believe that the question of human personhood is a medical and scientific question?

   No, this is not a medical or scientific question. Although science gives us some information or knowledge which we can use in making judgments science offers no opinion or judgment in and of itself.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

   It is my view that the question of human personhood is indeed moral, ethical, philosophical, religious and political. It is not a scientific question.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

   No, I do not believe that medical or scientific knowledge can answer the question although it may illuminate our thinking.

4. What in your judgment would be the impact if S. 158 is enacted? On the practice of medicine, on genetic screening, on the use of contraceptives or other?

   The impact of S. 158 would be to legislate an answer to a personal moral, ethical, philosophic, and religious question. It would restrict the freedom of people to make these decisions about these questions. On the practice of medicine it would make already difficult issues much more complicated. Not only would it be more difficult for the medical professional and patient involved in these questions but it would also create a bureaucracy to watchdog these issues. There would undoubtedly be review boards to review the committees who would decide on these questions. In general the operation of these sorts of committees

> and boards are so cumbersome that before answers could be obtained from them the issues would have changed. Many of these decisions must be made within a very short time frame, a matter of days.

Unfortunately, we do not live in a perfect world. Abortion is a sad event, but there are more tragic events that would occur if this option were not available. This bill would deny to those families who might have a genetic problem the opportunity to have normal children. In other words, if a family has a 1 in 4 chance of having a defective child they may choose to have no children at all rather than embarking on a pregnancy which might result in a life time of suffering.

It is a tragic event to have a mother find out that the unborn child she is carrying has anencephaly. It is a sadder event for her to have to carry this doomed infant to term and go through a full labor and delivery for an infant that will die within hours of birth. It is much more humane and less tragic to induce the delivery of that patient as soon as the defect is discovered.

Another instance is the tragedy of a very young teenager's pregnanacy. It has been shown that most teenagers who go through with a pregnancy have their education interrupted and end up in the welfare cycle of dependency on the social welfare system, with the only possibility of creativity in their lives being that of having more children. If the accidental pregnanacy can be interrupted these teenagers most frequently go on to complete their education, marry and have a normal number of children when they are more mature and able to care for them. In this case forcing the teenager to carry the pregnancy to term results in her having her family early,at a time when she is least able to take care of it. If this pregnanacy can be interrupted she will often end up with the same number of children, but at a time in her life when she can take care of them in a stable situation. To force a young teenager to go through a pregnancy is to deny life to the children who would be born to her later.

There are a number of people who because of their psychological, intellectual or social limitation do not have the self control to use contraceptives and as a result conceive unwanted children. An unwanted child is very likely to be an abused or neglected child. These children not only lead miserable lives themselves, but are a great burden to society and often grow up to be socially aberrant themselves. These same people usually do not have the maturity to give their children up for adoption at birth.

Beyond the ethical and human aspect of this issue there are economic and legal ones. The economic impact of unwanted or medically defective children on society is staggering. Institutionalization of one child costs tens of thousands of dollars per year that could be devoted to the better development of children who could be productive members of society. Our resources are not unlimited.

Furthermore, if the fetus is a person from conception this raises an incredible number of legal problems. What could be done to the parent in the interest of the fetus who is dependant on that person's body. May parents be jailed, hospitalized coerced or restricted from various activities on behalf of the newborn fetus who has no possible life outside of the parent's body? Who has priority over the body that is occupied? On the other hand should women be compensated for boarding the new citizen? I do not think we want to embark on this tangled scheme of setting moral and religious values.

Personally and professionally I feel that the fetus becomes a person only when he is capable of life, independent of the mother. Despite the fact that I am an advocate for children and would advise undertaking some risk on the part of the mother for the fetus' well being, I feel that a woman or any person should have the right to decide what is done to their own body

Sincerely yours,

MARILYN B. ESCOBEDO, M.D.
Assistant Professor, Head
Neonatology

MBE/kp

Baylor College of Medicine
DEPARTMENT OF PEDIATRICS • 713 790-4781

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
 of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing to you in response to your letter as the ranking minority member of the United States Senate Judiciary Committee Subcommittee on Separation of Powers in regard to the hearings that your Subcommittee is holding on S. 158. You specifically asked my evaluation and response to S. 158 and requested answers to quite specific questions.

The first question asked whether I believe the question of human personhood is a medical and scientific question. Neither I nor my faculty whom I have polled believe that the question of human personhood is a medical or scientific question.

The second question was "Is it your view that the question of human personhood is in part a moral, philosophical, religious or political question?" Both I and my entire faculty believe that the question of human personhood is and includes moral, ethical, philosophic, religious and political issues.

Thirdly, you asked whether I believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context. We do not believe that medical or scientific data can determine what the definition of human personhood should be in the present context.

Fourthly, you ask in my judgement, what would the impact of S. 158 be if enacted: On the practice of medicine; on genetic screening; on the use of contraceptive; and in other areas. In our opinion, this act would totally eliminate the availability of prenatal diagnosis for the detection of genetic disorders. Prenatal diagnosis is a medical service that has grown directly in proportion to the public understanding and awareness of its availability. We firmly believe from our own contact with numerous patients that a majority of the population are inclined to use prenatal diagnosis, if their personal medical circumstances make this an appropriate option. This does not mean that they necessarily favor abortion but rather that they wish to be informed whether the fetus they are carrying will be healthy or diseased. Unless the bill is defeated or modified, the bill also would appear to prohibit a number of contraceptive methods that are utilized widely by our patients. In general, our faculty is quite in harmony with the testimony provided to your committee by Dr. Leon Rosenberg.

I would like to provide a number of additional comments. The population clearly is divided in its views as to the appropriateness of abortion under

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various circumstances. It is clearly an issue that raises very strong emotions on both sides. However, it is my firm opinion that a clear although perhaps more silent majority of the United States population do not wish to further restrict the availability of abortion and that this majority view should prevail in the present environment. In addition, the present status allows more personal freedom on the part of individuals regarding a question on which there is a wide difference of opinion. Senate Bill S. 158 would result in the imposition of a view of what we believe to be the minority on the majority. I think it is important to recognize that a large number of people who do not believe that abortion is right and who would not use the procedure themselves, still do not wish to prohibit it for those who feel that it is appropriate for them.

From personal experience with large numbers of patients, I believe that a majority of the population might even choose to use abortion under certain circumstances although they perceive themselves as unlikely or unwilling to utilize this option at all. The most common example of this would be a 40 year old woman with an unplanned pregnancy. Prior to the pregnancy, the family frequently considers themselves as basically unwilling to consider abortion as an option. However, faced with the availability of prenatal diagnosis and coupled with the increased risk related to maternal age, the family might choose to request that an amniocentesis be performed. Such an amniocentesis would not be possible if this bill were passed even though there would be a 98 percent chance that the answer given to them would be that they child would be healthy and they would choose the option to carry to term. In fact, a large proportion of patients who are unalterably opposed to abortion under any circumstances still request prenatal diagnosis with the major motivation that they will obtain reassuring data.

We also have seen a number of circumstances in which a family who considered themselves unalterably opposed to abortion elected to use the procedure when faced with a severely handicapped fetus. Many of our patients who are opposed to abortion, when faced with the certainty that their child will be born with malformations or retardations, frequently choose abortion as the better of two unpleasant alternatives.

In summary, I have attempted to answer your questions and also to provide you with some insight based upon the experience of our Department based on their contact with numerous patients. I hope that this information is of value to your committee in this very serious and challenging deliberations.

Sincerely,

Ralph D. Feigin, M.D.
J. S. Abercrombie Professor
of Pediatrics and Chairman,
Department of Pediatrics
Baylor College of Medicine
and
Physician-in-Chief
Texas Children's Hospital

RDF:cb

COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY

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1981 JUN 14 AM 10 34

June 11, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your inquiry regarding S 158. I am most happy to respond and I hope my comments will be helpful to the committee. My responses to the four questions, which you have posed, are as follows: -

1. Do you believe that the question of human personhood is a medical and scientific question?

A. I do not believe that human personhood can be defined in strictly medical or scientific terms. However, even if we were to use such a narrow definition, a human conceptus can only be considered a potential person. It is true that the genetic code or design for a human exists at conception, but the "building materials" for that physical human being must come from the mother. Without proper conditions for development within the mother, that potential human being will never be realized. It is as absurd to call a conceptus a human being, as it is to call an architect's design, a house, or a seed, a tree. Each potentially can develop, given the time, the building materials and the right conditions, but there are no guarantees that the potential will be realized. Cases exist in which a human conceptus does not result in development of a fetus, but rather in development of a hydatidiform mole or even choriocarcinoma, a cancer which can kill the mother. Therefore, considering the biologic waste there is in nature, to try to give rights of an actual person to a potential person would be an impossible task and would wreak havoc with our legal system.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

A. Depending upon the context in which human personhood is being considered, moral, ethical, philosophical, religious and political factors are involved.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

A. In a legal context I absolutely do not believe that medical and scientific data alone can determine the definition of human personhood. Individual as well as societal issues must be considered when making legal judgements. This issue has important societal implications just as does the voting age, the age of majority etc.

4. What, in your judgement, would be the impact if S 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

A. If S158 is enacted a two, four or eight cell mass with human DNA will be given legal rights. Since the mother is a separate individual one might think that the conceptus still could not claim rights to the mother's amino acids, carbohydrates, minerals etc. However, in lines 9 through 12 on page 2 of the bill it states that this "person" cannot be deprived of life based upon a condition of dependency. Therefore it would seem that the bill might be in conflict with the mother's property rights, that is, rights to her own body and its chemicals and functions.

Dangerous medical situations could arise, for instance in the event of an ectopic pregnancy or pregnancy outside the uterus. Such legislation might prohibit termination of an ectopic pregnancy as long as the fetus remained alive. However, continuation of the pregnancy would be life threatening to the mother as well as, almost inevitably, to the fetus. Physicians, fearing legal consequences, might procrastinate or fail to perform the usual necessary medical procedures in order to protect the mother's health in such a case. This legislation would also lead to confusion over legal consequences of the current standard medical practices in cases of spontaneous abortion. hydatidiform mole, choriocarcinoma etc.

If the mother did not provide an adequate environment for fetal development either through negligence or through physical inability, she might be subject to prosecution or other legal liability. Since approximately one tenth of all documented pregnancies result in spontaneous abortion, women may fear to initiate any pregnancy, since it may result in a situation of legal jeopardy.

Additionally, legal actions against physicians, who prescribe medications which are necessary for the mother but may in some way be harmful to the fetus will certainly increase and this may lead to dangerous medical practices.

With regard to genetic screening, the screening itself is a neutral issue. Detection of defects is in general beneficial even when a woman chooses the option of continuing a pregnancy in which the fetus is abnormal. It takes time for a couple to adjust to the birth of an abnormal child. In many instances, such as Down syndrome, early intervention can greatly improve the quality of life for the affected child and the parents themselves. Knowledge of the situation long before the child is born can allow parents, physicians and support groups valuable time to prepare for the birth of a child with a problem. Also in genetic screening, the vast majority of results obtained are normal and provide great relief and comfort to pregnant women, particularly those over 35 years of age and those women who have previously given birth to an abnormal child.

The impact in genetic screening would be restricted to a small percentage of women who unfortunately would find themselves carrying an abnormal child and under the terms of this bill would be prohibited from the option of terminating the pregnancy. Most women in such a situation believe that it is morally wrong to bring a child into the world with a major defect. The moral values of these women would be totally violated under the terms of S158 which would enforce a moral code that, judging from my patient population, applies to a very small minority of women.

With regard to the use of contraceptives, it would seem that this bill would prohibit the use of all methods which interfere with implantation of the conceptus. Therefore, intrauterine devices would be illegal. The intrauterine device is a popular and effective method of birth control. In patients who have medical problems which preclude use or oral contraceptives, intrauterine devices have been used extensively. Also, in very young patients or handicapped patients, the intrauterine device may be the only practical method of temporary birth control.

This law would not only prohibit insertion of these devices but would also mandate immediate removal of all such devices. Patients found to be wearing the devices after passage of this bill could conceivably be tried for murder.

No doubt this bill will result in large numbers of young women seeking permanent sterilization.

In addition to these issues, I would like to raise another issue based upon my experiences as a third year medical student in the College of Medicine and Dentistry of New Jersey in Newark, prior to the legalization of abortions.

Women have soughtabortions whether legal or not. I personally cared for many victims of these illegal, lay abortions. I saw many young women in septic shock. I saw many young women permanently sterilized or even castrated as a consequence of their involvement in a lay abortion.

Most of us consider the loss of a potential human being to be tragic. However, I believe that the loss of an actual human being is far more tragic. Also, castration or permanent sterilization results in the loss of many future potential human beings. Society demands responsible lawmaking and decisions. I believe that S 158 is a bill that society cannot and will not be able to enforce. It may be a fine exercise in philosophy or religion but its impact on actual people in our society can be devastating. Therefore, I sincerely hope that our legislators will exercise rational thought processes and will prevent passage of this impractical bill.

Thank you again for allowing me to participate in the evaluation of S158. I hope my comments have been of assistance to you and I will be most willing to participate further if you have any additional questions.

Sincerely,

Karen Filkins, MD.

Karen Filkins, M.D.,F.A.C.O.G.
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Department of Obstetrics and Gynecology
Director, Obstetrics and Gynecolgy
Genetics Division

KF:jk

MEDICAL GENETICS PROGRAM
The University of Utah and the
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June 2, 1981

Senator Max Baucus
c/o United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

As per your letter of May 13, 1981, I would like to respond with the following remarks:

Question 1: I do not believe that answers to questions concerning the beginning of human personhood are of a medical or scientific nature.

Question 2: I believe that answers to questions concerning the beginning of human personhood are religious, very personal and not political.

Questions 3: I do not feel it is possible for a scientific investigator to devise an experiment which can determine the beginning of human personhood; therefore the answer to the question is not within the purview of science.

Question 4: As a medical geneticist and pediatrician, I feel the sponsors and supporters of S. 158 do not realize all the consequences of their intentions:

a. genetic/prenatal diagnosis will probably be outlawed; this early opportunity to evaluate the fetus is a reproductive option which is extremely important to a large number of families,

b. in fact, perhaps 10-20% or more of all fertilized eggs are genetically or structurally abnormal. Under the proposed law women and physicians who fail to maintain a faltering pregnancy (normal or abnormal) may be guilty of murder. Thus many women will be forced to give birth to severely deformed children. Who will pay for these children?

c. research in the areas of human reproductive physiology, birth control and fetal medicine including treatment of defective fetuses may be stopped,

d. physicians and families may be forced to treat full term babies born without brains, kidneys, etc. Who will pay for the long term care of these severely handicapped individuals? Who will help the family with the emotional trauma they will face?

e. if some states are more lenient than others then rich citizens will travel to neighboring states to receive needed medical services while poor citizens will suffer needlessly.

As a citizen of the United States and president of the board of trustees of Utah's only synagogue, as well as physician specializing in the area of genetics, I think it is necessary for me to provide you with the following quote which I feel has great significance:

> "Then the Lord G-d formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul."
> (Genesis 2:7)

Although I may sound facetious, I have long known that fertilized eggs do not have nostrils and I tend to accept this quote literally. In my opinion the soul enters the body when the lungs expand for the first time. I do not feel it is essential that others be forced to share my religious beliefs as long as I am not obliged to live according to theirs, and, perhaps more in point to your inquiry, to fail to provide to my patients what I believe is necessary medical care.

Sincerely yours,

Robert M. Fineman, M.D., Ph.D.
Director, Division of Medical Genetics
University Medical Center

RMF/lrm

UAB
The University of Alabama in Birmingham
Laboratory of Medical Genetics
205/934-4968

June 11, 1981

The Honorable Max Baucus
Subcommittee on Separation of Powers
U. S. Senate
Washington, D.C. 20510

Dear Senator Baucus:

I appreciate receiving your letter of May 13th and a copy of S. 158. I am pleased to have the opportunity to express my viewpoint on this proposed legislation.

The chromosome pattern established at time of conception is only the blueprint from which an organism develops. The message from the genes on the chromosomes directs the growth, development, and differentiation of all the cells which together comprise the human body. Although scientific progress has been most significant, there are many unanswered questions concerning embryological development.

I do not understand the necessity of a bill to establish personhood. Many of the discussions about topics referred or implied in S. 158 are of a theological nature. Input from many areas is necessary in reaching certain decisions about health care. There are moral, ethical, political, medical, and religious opinions that must be carefully considered if certain guidelines and decisions are to be incorporated into the country's health care plans. It is important that a leading denomination has taken a well defined position and recognizes circumstances making pregnancy termination permissible. I do not believe that a definition of personhood solely rests on medical and scientific data. Neither do I think this is a question for any single segment of our society. The questions of use of public funds for abortion is not justification for a constitutional amendment or a bill to determine the unanswerable questions about personhood and the soul.

The partnership that has evolved between the U. S. Congress and other governmental agencies with the private sector in promoting maternal and child health is impressive. Inhibitory legislation could seriously retard the progress being made. Research to learn more about human growth and development and the incorporation of this new knowledge into health care and services has been directly related to a decreasing infant death rate, reduction of the burdens on families, increase in options for family planning, improvement of the quality of life at all ages, and enlightenment about the epidemiological and longevity factors for many diseases. A number of programs in maternal and child health have contributed to this progress, but none promise more than the newly instituted services under the National Genetics Diseases Act.

Of great concern to me is the impact that passage of S. 158 would have on the further development and refinement of a nationwide genetic services program. Genetic testing and counseling have the primary aim of helping a specific family have the normal child that they desire. Genetic services include pedigree analysis, laboratory tests, clinical studies, and genetic counseling. To locate those families needing genetic services requires an extensive educational effort for both public and health professional groups. The maternal and child health programs have a responsibility to provide genetic information to families needing it in order to increase their options for family planning. If the cause for a birth defect or mental retardation can be determined then recurrence risks and other health information can be provided the family. If it is found that a family is at increased risk for having an affected child, then pedigree analysis, and, in some situations, prenatal diagnosis will be helpful in preparing for the abnormal child. If pregnancy termination is an option, then the family should have the right to choose it.

I am not sure why some would propose the limiting of options open to families who may be at risk for a child with a severe disorder characterized by birth defects and mental retardation. Some individuals have said that prenatal testing is a search and destroy program. Rather it is an approach to provide health information to families for their use. Requests for services are increasing rapidly and an article on the acceptance of these procedures is included. Also enclosed are copies of letters which recently appeared in Newsweek.

Genetic services provide information to families so that they can make informed decisions. Safeguards are needed to insure that clinical applications are appropriate. Medical geneticists are most interested in avoiding abuse and are eager to develop education programs. To force a family against their desire to have a child with a fatal genetic disease or as a result of rape or incest would be unimaginable. Contraception is apparently acceptable to a majority of our population. S. 158 could lead to prohibition of any health research or service activity aimed at understanding fertilization mechanisms.

We can predict with all certainty that the health practice of genetic screening will advance because of the promise it affords for improved health. The example of screening newborns for phenylketonuria and hypothyroidism illustrates the importance of prevention of mental retardation.

The new technology in maternal and child health has produced breakthroughs analogous to development in other areas that have perplexed our society. I am confident that Congress will recognize the merit of not enacting legislation such as S. 158 which reduces options open to families.

Thank you for the opportunity to submit these comments. I wish your Committee success in the deliberation of the issues raised and hope that maternal and child health services to include genetic services will be expanded.

Sincerely,

Wayne H. Finley

Wayne H. Finley, Ph.D., M.D.
Director
Laboratory of Medical Genetics

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Encls

GENE DOCTORS

I deeply resent the implication in your article "The New Gene Doctors" (MEDICINE, May 18) that those who elect to have genetic testing done on their unborn children are attempting to "avoid the issue through abortion." My husband and I lost our first baby to a very rare neurological disorder. The child lived one week, much longer than expected. We are expecting another baby this year and have had both ultrasound and amniocentesis performed for two reasons: first, to relieve or confirm our fears of a repeated tragedy, and second, to be aware of any disorder that would be incompatible with life, thus avoiding another fruitless nine-month pregnancy. No one who has lost a baby after a trouble-free pregnancy would care to repeat the experience.

BARBARA B. CAUBLE
Bellaire, Texas

I am the mother of an only child who is slowly dying from an exceedingly rare and incurable genetic disease caused by matching recessive genes from each parent. Amniocentesis is one hope medical science can offer, and I feel angered and threatened by the actions of right-to-life groups. I know more about the love of a child than any one individual involved in the right-to-life groups can imagine. I also know that I couldn't go through the devastating heartbreak of watching another beautiful child slowly become paralyzed, blind and mentally impaired.

CAROLE WOHLFORD
Edwardsville, Ill.

The Adventurer

OF

The Episcopal Church of the Advent

2019 6th AVENUE NORTH, BIRMINGHAM, ALABAMA 35203

Vol. 6, No. 30 October 12, 1980

THE EPISCOPAL CHURCH'S POSITION ON ABORTION

The official position of the Episcopal Church can only be enunciated by the General Convention. Individuals and either the House of Deputies or the House of Bishops may voice opinions, but only the General Convention can speak for the Church. In recent times, several pronouncements on the subject of abortion have been made, the latest by the 1976 General Convention. This subject is widely discussed, and people seek guidance in forming their own opinions. Not all will agree with the resolution of the General Convention, but all should accord it due consideration as an expression of the duly constituted voice of this Church.

The resolution is too lengthy to print in full, but the salient points are:

1. The beginning of a new human life is a gift of the power of God, thus sacred, and should be undertaken reverently and with understanding that it is a gift of God.
2. Christians have a responsibility to limit the size of their families, and to practice birth control. Such means do not include abortions for convenience.
3. Termination of pregnancy is permissible when the physical or mental health of the mother is threatened seriously, or where there is reason to believe that the child would be deformed in mind or body, or where the pregnancy has resulted from rape or incest.
4. In cases where it is firmly believed by the person or persons concerned that the pregnancy should be terminated for any other reason, members of the Church are asked to seek the advice and counsel of a Priest of the Church.
5. Whenever members of the Church are consulted about an abortion, they are urged to explore with the persons involved other preferable courses of action.
6. The Episcopal Church expressed unequivocal opposition to any legislation which would abridge the right of individuals to reach informed decisions in this matter and act upon them.

The subject of abortion has far reaching implications, and this resolution deserves thoughtful consideration. CBM

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Participants' Reaction to Amniocentesis and Prenatal Genetic Studies

Sara C. Finley, MD; Pamela D. Varner, MD; Paula C. Vinson, PhD; Wayne H. Finley, PhD, MD

• Little is known about the effect of amniocentesis and prenatal diagnosis of genetic disease on couples undergoing such studies. A questionnaire was composed to evaluate, among other things, the reason for referral, attitudes and concerns of the pregnant woman and her husband toward prenatal study, and suggestions for improving the experience. Of 315 women referred to this unit for this purpose, 196 have had time to complete their pregnancy and were mailed the questionnaire; 157 (80%) of the latter responded. The majority of the women found the experience reassuring, would recommend it to others, and would seek it again themselves with a subsequent pregnancy.

(*JAMA* 238:2377-2379, 1977)

AMNIOCENTESIS for prenatal detection of genetic disease is accepted as safe and accurate, although potential dangers do exist.[1-4] Each patient having the procedure should have the possibility of fetal or maternal injury explained. The National Institute of Child Health and Human Development (NICHD) National Registry for Amniocentesis Study Group states, "Midtrimester amniocentesis is a highly accurate and safe procedure that does not significantly increase the risk of fetal loss or injury."[3] Many couples are curious about the chromosomal pattern of the fetus and might request amniocentesis to predict the sex of their baby. However, it should be emphasized that this procedure is indicated, currently, only when there is a known increased risk of a genetic disorder in the fetus.

Clinical judgment is required to assess the risk of such a disorder in the fetus relative to the risks inherent in the procedure itself. The accepted indications for prenatal genetic studies are as follows: (1) maternal age of 35 years or older, (2) history of a previous child with a chromosomal aberration, (3) parent a known carrier of a translocation chromosome, (4) history of a previous child with a detectable biochemical disorder, (5) mother a known carrier of a detrimental X-linked gene, and (6) family history of an open neural tube defect. Laboratory facilities and personnel presently are not available to make prenatal genetic studies available to all who might elect the procedures for one of these reasons. However, it is expected that more couples will have access to amniocentesis and the associated genetic studies as increasing numbers of medical centers acquire the necessary personnel and equipment.

While much has been written about the technical aspects of amniocentesis, culture of the amniotic fluid cells, and subsequent cytogenetic or biochemical studies, little is available about the impact of such studies on the participating couples.[5] This lack of information about the reaction to important techniques that are becoming available in the health care provision system may be summarized by the following statement: "There has been too little attention paid so far to detailed examination of the thoughts, feelings, and attitudes of women who have undergone amniocentesis, or of those of their husbands."[6] This opinion was expressed at a meeting sponsored by the National Academy of Sciences on Genetic Screening in 1975.

METHODS

The Laboratory of Medical Genetics, in collaboration with the Department of Obstetrics and Gynecology of the University of Alabama in Birmingham, is a referral center for amniocentesis and prenatal diagnostic studies. Ordinarily, the patients referred for this purpose are seen for genetic counseling by a staff member of the Laboratory of Medical Genetics, and the amniocentesis is performed by a staff member of the Department of Obstetrics and Gynecology. Occasionally, a sample of amniotic fluid will be received from out of town, although patient referrals to the center are encouraged.

To determine some of the concerns and reactions of participating couples, a questionnaire composed of 33 short-answer questions was designed by the staff of the Laboratory of Medical Genetics. The questions were reviewed by a member of the Department of Obstetrics and Gynecology and by a clinical psychologist.

A total of 315 patients have been referred to this laboratory for prenatal genetic studies. Of these, 196 completed their pregnancy and received a mailed questionnaire. A total of 157 (80%) of these 196 have responded. Of the 315 patients having prenatal studies, 11 abnormal results were found by amniocentesis. Ten of these 11 women were included in the group of 196 who received the mailed questionnaire. Of the 11 patients who had abnormal test results, 8 elected to have an artificial termination of the pregnancy, 2 carried to term a fetus with trisomy 21, and 1 carried to term a fetus with a balanced translocation. The 11 abnormalities found on prenatal genetic studies included eight abnormal fetal karyotypes and three elevated amniotic fluid α-fetoprotein levels. The abnormal fetal karyotypes found were 5 with trisomy 21, 1 with trisomy 18, 1 with XYY, and 1 with a

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From the Laboratory of Medical Genetics and the Department of Pediatrics, University of Alabama in Birmingham, Birmingham. Dr Varner is now with the University of Alabama Hospitals and Clinics, Birmingham.

Reprint requests to Laboratory of Medical Genetics, The University of Alabama Medical Center, University Station, Birmingham, AL 35294 (Dr S. Finley).

balanced translocation. Five of the eight women who had their pregnancy interrupted responded to the questionnaire. Of the three women with an abnormal test result who carried the pregnancy to term, two responded.

Selected questions from the questionnaire and the responses are given. The number of respondents to the individual questions varies as shown by the numbers in parentheses: number of women marking a specific answer/total number of women responding to that question. For some questions, more than one response was appropriate so that the total percent response in these instances exceeds 100.

RESULTS

The following questionnaire was used:

(1) The reason you had this test was:

57% (89/157)	You were 35 years of age or over.
18% (29/157)	You had previously had a child with a chromosome disorder such as Down's syndrome (or mongolism).
1% (1/157)	You or your husband are known to carry a balanced chromosome translocation.
1% (2/157)	You are a known carrier of an X-linked disorder such as hemophilia or Duchenne's muscular dystrophy which you could pass on to your sons.
20% (31/157)	You had previously had a child with an open spine or large head.
4% (6/157)	Other

(2) How did you first learn about amniocentesis (getting fluid from around the developing baby) and prenatal diagnosis of genetic defects?

62% (98/157)	Local obstetrician or family physician
6% (10/157)	Medical geneticist
4% (6/157)	Pediatrician
3% (5/157)	Teacher
27% (43/157)	I read about it
6% (10/157)	I heard about it on TV
7% (11/157)	A friend told me about it
10% (15/157)	Other

(3) How would you classify your local doctor's attitude toward the test?

91% (143/156)	In favor and encouraging
4% (6/156)	Neutral
4% (6/156)	Not in favor or discouraging
1% (1/156)	Never heard of test

(4) Did your local doctor explain what the test would be like and exactly what the test would show?

90% (123/136)	He did explain the procedure
10% (13/136)	He did not explain
88% (111/126)	He did explain what the test would show
12% (15/126)	He did not explain what the test could show

(5) Did you have any problems following the amniotic fluid tap?

85% (134/157)	No
15% (23/157)	Yes
If yes, what?	
1% (2/157)	Bleeding
2% (4/157)	Leaking of clear fluid vaginally
15% (23/157)	Abdominal cramps
0%	Fever (within one week of the tap)
1% (2/157)	Miscarriage
2% (3/157)	Other

(6) Before the withdrawal of fluid, what were your greatest concerns about the test?

25% (40/157)	Unknown aspects of the test
36% (57/157)	Afraid the test would be painful
60% (94/157)	Possible injury to the fetus
30% (47/157)	Possible miscarriage
3% (5/157)	Possible injury to yourself
49% (77/157)	Having to decide whether or not to artificially end the pregnancy
66% (104/157)	Results of the test
3% (4/157)	No concern
1% (2/157)	Other

(7) If you were to have this test again, what would be your greatest concerns?

8% (13/157)	Pain associated with the procedure
22% (35/157)	Having to have fluid withdrawn more than once
36% (56/157)	Possible injury to the fetus
25% (39/157)	Possible miscarriage
46% (72/157)	Having to decide about ending the pregnancy
67% (105/157)	The results of the test
4% (6/157)	Doctor other than own during the test
8% (12/157)	No concerns

(8) When you first came to have the amniotic fluid withdrawn, did you plan to end the pregnancy if the test showed that you were carrying an abnormal fetus?

71% (110/156)	Yes
6% (10/156)	No
23% (36/156)	Undecided

(9) What was your husband's first reaction to your having the test?

70% (110/157)	He was strongly in favor.
11% (18/157)	He had hesitations.
1% (2/157)	He strongly disapproved.
3% (5/157)	He had no opinion.
13% (21/157)	He felt it was your decision.
14% (22/157)	He felt the decision should be left up to the doctor.
1% (2/157)	Other

(10) Did you decide to become pregnant because you knew this test was available?

17% (26/153)	Yes
83% (127/153)	No

(11) If you became pregnant again, would you have this test again?

94% (137/146)	Yes
4% (6/146)	No
2% (3/146)	Undecided

(12) Would you recommend others to have this test?

98% (141/144)	Yes
2% (3/144)	No

(13) What do you think could be done to improve the experience of having amniotic fluid removed and chromosome or other studies done?

See comment.

COMMENT

The three major reasons for referral were (1) maternal age of 35 years or older, (2) previous child with a chromosomal abnormality, and (3) previous child with a neural tube defect. A physician first suggested the procedure to more than half of the patients, while a substantial number first learned about the procedure through mass media, such as reading or television. While public education prompted a substantial number of requests, the number of women who had never heard of the test prior to having it recommended by their physician emphasizes the need for more availability of information.

The major concerns of women prior to amniocentesis were as follows: (1) whether the test would show an abnormality (66%), (2) possible fetal injury (60%), (3) possibility of having to make a decision about abortion (49%), (4) pain (36%), and (5) possible miscarriage (30%). Projecting what their concerns would be if they were to have an amniocentesis and prenatal genetic studies with a subsequent pregnancy, fewer of them would be concerned about pain associated with the procedure or fetal injury occurring as a complication. The number having other concerns as listed in questions 6 and 7 would remain relatively constant should they have another study in the future.

In accordance with the National Foundation—March of Dimes policy concerning prenatal diagnosis of birth defects using amniocentesis, prenatal diagnosis was available to women at risk without any conditions regarding their attitudes toward abortion. In response to question 8, three fourths of the women stated that they would elect to have the pregnancy terminated if test results indicated an abnormal fetus. Six percent, however, felt strongly that they would not end their pregnancy regardless of the results of the study. A few of the latter indicated that they would prefer to know in advance if an abnormality were present so that they could be prepared for having a handicapped child.

The majority of husbands were strongly in favor of the test. Those who had hesitations reflected the same major concerns as the women. The two men who definitely disapproved were opposed to therapeutic abortion, while their wives were in favor or undecided. Since the husband and wife share concerns about the test and results that have far-reaching implications for the couple, it is important that both be included in the counseling session.

The availability of the test did not influence many of the couples in their decision to plan a pregnancy. Since many couples fear pregnancy because of a known risk of birth defects, dissemination of information about the availability of prenatal genetic studies could have a substantial impact on family planning in the future.

Overall reaction to genetic studies was judged to be assessed best by question 11, "If you became pregnant again, would you have this test again?" and question 12, "Would you recommend others to have this test?" the overwhelmingly favorable response indicated that amniocentesis and prenatal diagnosis were generally considered positive and worthwhile experiences. It will be noted that 146 of the 157 respondents answered the first of these questions and 144 answered the second. It is impossible to ascertain the reaction of those persons who took the time to answer the questionnaire but elected not to answer a specific question on it. However, the favorable response to these two questions included four of the five respondents who had a therapeutic abortion because of an abnormal test result.

Six of the 146 respondents to question 11 indicated that they would not elect to have the test with a subsequent pregnancy. Of these, 1 was concerned about the safety of the procedure, since fetal death of unknown cause occurred subsequent to the amniocentesis; 1 received no results because of inadequate cell growth from fluid sent from out of town; 1 elected to carry a fetus with trisomy 21 to term; 2 were opposed to therapeutic abortion; and 1 gave no reason. A total of 98% of the women responding to question 12 (141/144), including three of the six women who would not elect to have the test again themselves, stated that they would recommend the test to others.

The primary suggestion for improving the experience as asked in question 13 was to decrease the waiting time for results; currently the interval between amniocentesis and a report of the results is approximately three weeks in our laboratory. This time interval is consistent with that reported by other laboratories.[4] In addition, the experience would be improved for the couple if the referring physicians were to explain the procedure and what the test could show. There is a need for more information about prenatal diagnosis in the form of pamphlets and booklets, as well as for more publicity and mass media coverage.

The general impression from both verbal and written responses of women having an amniocentesis for prenatal genetic studies is that adequate genetic counseling before the procedure is of utmost importance. Public information will help in removing some of the apprehension and uncertainty for the patient referred for this purpose, but many patients have indicated that there is no substitute for an individual counseling session, with preferably both husband and wife having the opportunity to ask questions. Robinson et al[7] also have emphasized the need for free discussion during genetic counseling.

Although midtrimester amniocentesis for the purpose of prenatal diagnosis of genetic disease is considered "safe and accurate," there are potential complications to the amniocentesis and potential problems of misinterpretation of results from the study. As was pointed out by the report of the NICHD study,[3] meticulous attention must be paid to every detail of the laboratory studies, and the amniocentesis should be done by practitioners adequately trained in proper techniques.

In summary, now that amniocentesis and prenatal diagnosis have moved from the realm of research into clinical application, the effect of these tests on participants needs to be evaluated. This relatively small but ongoing study shows that the majority of women using these studies considered them a positive and reassuring experience.

This investigation was supported by project 905, HSMHA, Department of Health, Education and Welfare, a service grant from the National Foundation—March of Dimes, and National Institutes of Health grants #RR05300 and RR05349.

The staff of the Department of Obstetrics and Gynecology cooperated in the Prenatal Genetic Clinic; Ed Carney, MD, and C. J. Rosecrans, PhD, reviewed the questionnaire, technical help was given by the cytogenetics technicians in the Laboratory of Medical Genetics; and Aubrey Milunsky, MD, performed the α-fetoprotein determinations.

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the hastings center REPORT
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Volume 2, Number 5: November, 1972

Indicators of Humanhood: A Tentative Profile of Man

? Eugenics

It's time to spell out the "which" and "what" and "when"

by JOSEPH FLETCHER

Mark Twain complained that people are always talking about the weather but they never do anything about it. The same is true of the humanhood agenda. In biomedical ethics writers constantly say that we need to explicate humanness or humaneness, what it means to be a truly human being, but they never follow their admission of the need with an actual inventory or profile, no matter how tentatively offered. Yet this is what must be done, or at least attempted.

Synthetic concepts such as *human* and *man* and *person* require operational terms, spelling out the which and what and when. Only in that way can we get down to cases—to normative decisions. There are always some people who prefer to be visceral and affective in their moral choices, with no desire to have any rationale for what they do. But *ethics* is precisely the business of rational, critical reflection (encephalic and not merely visceral) about the problems of the moral agent—in biology and medicine as much as in law, government, education or anything else.

To that end, then, for the purposes of biomedical ethics, I am suggesting a "profile of man" in concrete and discrete terms. As only one man's reflection on man, it will no doubt invite adding and subtracting by others, but this is the road to be followed if we mean business. As a dog is said to "worry" a bone, let me worry out loud and on paper, hoping for some agreement and, at the least, consideration. There is space only to itemize it, not to enlarge upon it, but I have fifteen positive propositions and five negative propositions. Let me set them out, in no rank order at all, and as hardly more than a list of criteria or indicators, by simple title.

Positive Human Criteria

Minimal intelligence. Any individual of the species *homo sapiens* who falls below the I.Q. 40-mark in a standard Stanford-Binet test, amplified if you like by other tests, is questionably a person; below the 20-mark, not a person. *Homo* is indeed *sapiens*, in order to be *homo*. The *ratio*, in another turn of speech, is what makes a person of the *vita*. Mere biological life, before minimal intelligence is achieved or after it is lost irretrievably, is without personal status. This has bearing, obviously, on decision making in gynecology, obstetrics and pediatrics, as well as in general surgery and medicine.

Self-awareness. Self-consciousness, as we know, is the quality we watch developing in a baby; we watch it with fascination and glee. Its essential role in personality development is a basic datum of psychology. Its existence or function in animals at or below the primate level is debatable; it is clearly absent in the lower vertebrates, as well as in the nonvertebrates. In psychotherapy non-self-awareness is pathological; in medicine, unconsciousness when it is incorrigible at once poses quality-of-life judgments—for example, in neurosurgical cases of irreversible damage to the brain cortex.

Self-control. If an individual is not only not controllable by others (unless

ALSO IN THIS ISSUE:

The Other Drug Problem, by Peter Steinfels

The Dilemma of a Prison Doctor, by Frank Rundle, M.D.

That Virginia 'Brain Death' Case, by Robert M. Veatch

Dr. Joseph Fletcher is Visiting Professor of Medical Ethics at the University of Virginia School of Medicine. Excerpted from a paper presented at the National Conference on the Teaching of Medical Ethics, co-sponsored by the Institute and Columbia University College of Physicians and Surgeons.

'ly force) but not controllable by the individual himself or herself, a low level of life is reached about on a par with a paramecium. If the condition cannot be rectified medically, so that means-ends behavior is out of the question, the individual is not a person—not ethically, and certainly not in the eyes of the law—just as a fetus is not legally a person.

A sense of time. Time consciousness. By this is meant clock time or *chronos*, not timeliness or *kairos*, i.e., not the "fulness of time" or the pregnant moment (remember Paul Tillich?). A sense, that is, of the passage of time. A colleague of mine at the University of Virginia, Dr. Thomas Hunter, remarked recently, "Life is the allocation of time." We can disagree legitimately about how relatively important this indicator is, but it is hard to understand why anybody would minimize it or eliminate it as a trait of humanness.

A sense of futurity. How "truly human" is any man who cannot realize there is a time yet to come as well as the present? Subhuman animals do not look forward in time; they live only on what we might call visceral strivings, appetites. Philosophical anthropologies (one recalls William Temple's, for instance) commonly emphasize *purposiveness* as a key to humanness. Chesteron once remarked that we would never ask a puppy what manner of dog it wanted to be when it grows up. The assertion here is that men are typically teleological, although certainly not eschatological.

Hastings Center Report

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Bruce Hilton, Editor

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A sense of the past. Memory. Unlike other animals, men as a species have reached a unique level of neurologic development, particularly the cerebrum and especially its neo-cortex. They are linked to the past by conscious recall—not only, as with subhuman animals, by conditioning and the reactivation of emotions (reactivated, that is, externally rather than autonomously). It is this trait, in particular, that makes man, alone among all species, a cultural instead of an instinctive creature. An existentialist focus on "nowness" truncates the nature of man.

> *It is a*
> *sense of the past*
> *which makes man,*
> *alone among species,*
> *a cultural creature*

The capability to relate to others. Inter-personal relationships, of the sexual-romantic and friendship kind, are of the greatest importance for the fulness of what we idealize as being truly personal. (Medical piety in the past has always held its professional ethics to be only a one-to-one, physician-patient obligation.) However, there are also the more diffuse and comprehensive social relations of our vocational, economic and political life. Aristotle's characterization of man as a social animal, *zoon politikon*, must surely figure prominently in the inventory. It is true that even insects live in social systems, but the cohesion of all subhuman societies is based on instinct. Man's society is based on culture—that is, on a conscious knowledge of the system and on the exercise in some real measure of either consent or opposition.

Concern for others. Some people may be skeptical about our capacity to care about others (what in Christian ethics is often distinguished from romance and friendship as "neighbor love" or "neighbor concern"). The extent to which this capacity is actually in play is debatable. But whether concern for others is disinterested or inspired by enlightened self-interest it seems plain that a conscious extra-ego orientation is a trait of the species; the absence of this ambience is a clinical indication of psychopathology.

Communication. Utter alienation or disconnection from others, if it is irreparable, is de-humanization. This is not so much a matter of not being disposed to receive and send "messages" as of the inability to do so. This criterion comes into question in patients who cannot hear, speak, feel or see others; it may come about as a result of mental or physical trauma, infection, genetic or congenital disorder, or from psychological causes. Completely and finally *isolated* individuals are subpersonal. The problem is perhaps most familiar in terminal illnesses and the clinical decision-making required.

Control of existence. It is of the nature of man that he is not helplessly subject to the blind workings of physical or physiological nature. He has only finite knowledge, freedom, and initiative, but what he has of it is real and effective. Invincible ignorance and total helplessness are the antithesis of humanness, and to the degree that a man lacks control he is not responsible, and to be irresponsible is to be subpersonal. This item in the agenda applies directly, for example, in psychiatric medicine, especially to severe cases of toxic and degenerative psychosis.

Curiosity. To be without affect, sunk in anomie, is to be not a person. Indifference is inhuman. Man is a learner and a knower as well as a tool maker and user. This raises a question, therefore, about demands to stop some kinds of biomedical inquiry. For example, an A.M.A. committee recently called a halt on *in vitro* reproduction and embryo transplants on the ground that they are dangerous. But dangerous ignorance is more dangerous than dangerous knowledge. It is dehumanizing to impose a moratorium on research. No doubt this issue arises, or will arise, in many other phases of medical education and practice.

Change and changeability. To the extent that an individual is unchangeable or opposed to change he denies the creativity of personal beings. It means not only the fact of biological and physiological change, which goes on as a condition of life, but the capacity and disposition for changing one's mind and conduct as well. Biologically, human beings are developmental: birth, life, health, and death are processes, not events, and are to be understood epigenetically, not episodically. All human existence is on a continuum, a matter of becoming. In this perspective, are we to regard potentials *als ob*, as if they were actual? I think not. The question arises prominently in abortion ethics.

Balance of rationality and feeling. To be "truly human," to be a wholesome *person*, one cannot be either Apollonian or Dionysian. As human beings we are not "coldly" rational or cerebral, nor are we merely creatures of feeling and intuition. It is a matter of being both, in different combinations from one individual to another. To be one rather than the other is to distort the *humanum*.

Idiosyncrasy. The human being is idiomorphous, a distinctive individual. As Helmut Schoeck has shown, even the function of envy in human behavior is entirely consistent with idiosyncrasy. To be a person is to have an identity, to be recognizable and callable by name. It is this criterion which lies behind the fear that to replicate individuals by so-called "cloning" would be to make "carbon copies" of the parent source and thus dehumanize the clone by denying it its individuality. One or two writers have even spoken of a "right" to a "unique genotype," and while such talk is ethically and scientifically questionable it nonetheless reflects a legitimate notion of something essential to an authentic person.

Neo-cortical function. In a way, this is the cardinal indicator, the one all the others are hinged upon. Before cerebration is in play, or with its end, in the absence of the synthesizing function of the cerebral cortex, the *person* is non-existent. Such individuals are objects but not subjects. This is so no matter how many other spontaneous or artificially supported functions persist in the heart, lungs, neurologic and vascular systems. Such non-cerebral processes are not personal. Like the Harvard Medical School's *ad hoc* committee report on "brain death" the recent Kansas statute on defining death requires the absence of *brain* function. So do the guidelines recently adopted by the Italian Council of Ministers. But what is definitive in determining death is the loss of cerebration, not just of any or all brain function. Personal reality depends on cerebration and to be dead "humanly" speaking is to be ex-cerebral, no matter how long the *body* remains alive.

Negative Human Criteria

The five negative points I have can be put even more briefly than the 15 positive ones, although I am inclined to believe that they merit just as much critical scrutiny and elaboration.

Man is not non- or anti-artificial. As Gaylin says, men are characterized by technique, and for a human being to oppose technology is "self-hatred." We are often confused on this score, attitudinally. A "test tube baby," for example, although conceived and gestated *ex corpo*, would nonetheless be humanly reproduced and of human value. A baby made artificially, by deliberate and careful contrivance, would be more *human* than one resulting from sexual roulette—the reproductive mode of the subhuman species.

Man is not essentially parental. People can be fully personal without reproducing, as the religious vows of nuns, monks and celibate priests of the past have asserted, as the law has implied by refusing to annul marriages because of sterility, and as we see in the ethos-reversal of contemporary family and population control—and, more militantly, in the non-parental rhetoric of women's liberation and a growing rejection of the "baby trap".

Man is not essentially sexual. Sexuality, a broader and deeper phenomenon than sex, is of the fulness but not of the essence of man. It is not even necessary to human species survival. I will not try here to indicate the psychological entailments of this negative proposition, but it is biologically apparent when we look at such nonsexual reproduction as cloning from somatic cells, and parthenogenetic reproduction by both androgenesis and gynogenesis. What light does this biology throw on the nature of man; what does a personistic view of man say about the ethics of such biology? (N.B. I do not refer here to personalism, which has more metaphysical freight than many of us want to carry.)

Man is not a bundle of rights. The notion of a human *nature* has served as a conceptual bucket, to contain "human rights" and certain other *given* things, like "original sin" and "the sense of oughtness" and "conscience." The idea behind this is that such things are objective, pre-existent phenomena, not contingent on biological or social relativities. People sometimes speak of rights to live, to die, to be healthy, to reproduce, and so on, as if they were absolute, eternal, intrinsic. But as the law makes plain, all rights are imperfect and may be set aside if human *need* requires it. We shall have to think through the relation of rights and needs, as it bears on clinical medicine's decision-making problems, as well as society's problems of health care delivery. One example: What is the "humane" policy if we should reach the point (I think we will) of deciding for or against compulsory birth control? Or, how are we to relate rights and needs if, to take only one example, an ethnic group protests against mass screening for sickle cell

A test-tube baby
would be more human
than one resulting
from sexual roulette

anemia? Or if after genetic counseling a couple elects to proceed with a predictably degenerate pregnancy?

Man is not a worshiper. Faith in pernatural realities and attempts to be in direct association with them are choices some human beings make and others do not. Mystique is not essential to being truly a person. Like sexuality, it *may* arguably be of the fulness of humanness but it is not of the essence. This negative proposition is required by our basic guideline, the premise that a viable biomedical ethics is humanistic, whatever reasons we may have for putting human wellbeing at the center of concern.

More Thinking

How are we to go about testing such criteria as these? And how are we to compare and combine the results of our criticism? How are we to rank order or give priority to the items in our man-hood profile? Which are only optimal, which are essential? What are the applications of these or other indicators to the normative decisions of biologists and physicians? In my own list, here, which factors can be eliminated, in whole or in part, without lowering individuals and patients below the personal line? I trust that by this time it is plain that I do not claim to have produced the pure gospel of humanness. I remain open to correction.

The "nature of man" question is of such depth and sensitivity that it is bound to raise controversy, and our task is to welcome the controversy but try to reduce it through analysis and synthesis. Said Heraclitus: "Opposition brings concord. Out of discord comes the fairest harmony. It is by disease that health is pleasant; by evil that good is pleasant; by hunger, satiety; by weariness, rest."

As a final note, I rather suspect that we are more apt to find good answers inductively and empirically, from medical science and the clinicians, than by the necessarily syllogistic reasoning of the humanities, which proceeds deductively from abstract premises. Syllogisms always contain their conclusions in their major or first premises. Divorced from the laboratory and the hospital, talk about what it means to be human could easily become inhumane. ●●

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1981 MAY -1 PM 1:58

April 28, 1981

The Honorable Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Thank you for writing regarding S. 158.

There is no question that actual human life exists from conception. The fertilized egg is clearly alive, and if "human" is meant as a way of distinguishing that kind of life from other kinds of life (canine, avian, plant, etc.), there is little difficulty establishing that a fertilized egg inside a human is human and living.

The central question is the leap from that biological, scientific observation to the assertion that such life is a "person". Person is not a biologic word, but, as you suggest, a philosophical, moral, religious, etc. concept. It is also a legal concept, and the Congress could, I suppose, define it anyway it chooses. It could pass a law saying chimpanzees are persons (with more logic, in my view, than fertilized eggs), but that wouldn't make it true. Whether or not an egg is a person is not a statement that is true or false. It is not a type of statement that can be verified. It can be justified (using philosophical or religious arguments), but it can't be proven, anymore than you could prove what justice is, or what respect is, or what a friend is. The debate is over how we ought to define a word. I can't think of any scientific experiment that would answer that question, anymore than an experiment would tell us what justice means or love or truth or beauty. The only type of experiments would be the type that philosophers use, using words and principles, looking for agreement on premises, logical connections between those premises and stated conclusions, and consistency with other statements and principles. I can't imagine how science, in the traditional sense of that word (the study of the physical or material world), can resolve how we ought to define a concept. Science can't even tell us how we ought to define simpler concepts such as "earth", "time", "space", etc. Scientists can state their views on what we ought to mean by the word "earth", but I can't think of an experiment that would show how if two definitions are proposed, which one ought to be preferred or which one is the true definition.

In summary, I believe those who believe they have scientific data showing what person means do not understand the origins and purposes of definitions. Unlike physical laws, they are not discoverable. They can only be proposed, debated, and hopefully agreed upon, but not proven.

Best wishes,

Sincerely,

Norman Fost

Norman Fost, M.D.
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NF/kw

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81 MAY -4 PM 2 10

April 28, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Your letter of April 16 just arrived and I hasten to reply. In my opinion there is no doubt that the life of a particular individual begins at the moment of conception, and that the fertilized egg is, in a biological sense, alive. However, the point at which the organism resulting from a fertilized egg becomes a human being, or legal person, is quite another matter. In my opinion, the fertilized egg is no more a person than the blueprint of a ship is a ship. The fertilized egg contains the genetic information necessary to determine the development of the organism, but that is not by any means to say that it is a person. A human fibroblast, in a tissue culture, also contains the necessary genetic information but I doubt that anyone would consider that such a cell was a person. In order to decide when a fertilized egg becomes a person, one has to decide upon a definition, and that is a matter of judgement. It is something akin to trying to decide when the developing embryo, or fetus, acquires a soul, a question upon which there have been many pronouncements over the years, but no consensus.

In my opinion it would be unreasonable to consider a developing embryo, or fetus, a person until it had at least a neural anatomical basis for functioning as a person, but since this is a continuously progressive process one would still have to decide at what point along the developmental pathway one would consider the brain able to function. Another possible criterion would be the minimal age of viability which is, of course, changing. In summary, I see no scientific basis that would allow one to define the beginning of personhood objectively, and I believe that personhood emerges gradually as the embryo develops. I certainly do not think that personhood is present at the moment of conception.

I hope these comments are of some use to you. With best wishes.

Yours sincerely,

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P.S. Professor Lejeune's argument (which I heard on the radio) that the fertilized human egg must be a person because it develops into a human being and not a chimpanzee misses the point. Just because a fertilized egg will develop into a person does not mean it is a person.

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DEPARTMENT OF PEDIATRICS
area code 904

May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13, 1981. Relative to my evaluation of S. 158, I have the following answers to the questions posed in your letter:

1. I do not believe that the question of human personhood is a medical and scientific question.

2. It is my view that the question of human personhood is a moral, ethical and philosophical one.

3. I do not believe that medical and scientific data alone can determine what the definition of human personhood should be.

4. In my opinion, if S. 158 is enacted, it would bring about the limitation of individual choice by interferring with abortion regardless of its indication, with contraceptives that do not allow the implantation of the fertilized egg (i.e., IUD's) and with prenatal diagnosis of genetic disease.

I hope these comments will be of help to you.

Sincerely,

Jaime L. Frias, MD
Professor and Chief
Division of Genetics

JLF/lwp

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THE NEW YORK HOSPITAL-CORNELL MEDICAL CENTER

DEPARTMENT OF OBSTETRICS AND GYNECOLOGY

1981 MAY -5 AM 11: 19

April 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I thank you for your letter of April 14 regarding my opinion about the very difficult problem of the beginning of human personhood. It is a very difficult problem because there are several points of reference during human development that could be used to develop a definition. Let me explain what I mean.

(1) The egg cells in the human ovary, which are ovulated one at a time between the menarche and the menopause, are formed in the ovary during fetal development and are present at birth. Thus one of the two germ cells necessary for the formation of a new human individual are present from the birth of the mother.

(2) The male germ cells, the spermatozoa, are formed in the testicles a couple of months before conception. Thus, the other germ cell is alive and well months before conception.

(3) At conception, the human ovum is invaded by a single sperm cell and together the two germ cells form the first cell of the new individual.

(4) Eight days after conception, the fertilized ovum which has now divided several times and developed into a blastocyst, implants in the uterine tissue and establishes intimate and vital contact with the maternal circulation. According to the definition of the International Federation of Gynecologists and Obstetricians, this is when pregnancy begins.

(5) The human fetus is not viable outside the maternal body until it is approximately 28 weeks old, calculated from the last menstrual period (26 weeks from conception). One could argue that this represents the earliest possible time of life as an individual.

(6) Life as an independent individual begins at birth. The optimal time for human birth is 40 weeks after the last menstrual period.

As you can see, it is more of a legal question than medical or scientific which point of reference to select. I am afraid that the political decision might disregard the medical and scientific facts as well as the legitimate interests of the mother. I realize that my answers to your questions may not be of much help, but this is the best I can do.

Yours sincerely,

Fritz Fuchs

Fritz Fuchs, M.D.
Professor

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DEPARTMENT OF PEDIATRICS

May 26, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Baucus:

Upon receipt of your letter I was initially reluctant to respond. An anonymous voice in a wilderness populated with rabid protagonists and antagonists to S. 158 and all that it implies was not a desirable role. However, on reflection, I decided that the many anonymous "we" that never speak to this issue should be heard; hence this reply.

The issues of life and death are complex and have defied societal judgments of a permanent nature for millenia. Our society's current efforts are but the latest attempt to grapple with an issue that is almost undefinable and which has defied men of good will and sanity in its resolution. With these historical and global thoughts in mind, I will attempt a personal response to the thoughtful questions contained in your letter.

Human personhood, by definition, is not a medical and scientific decision, but a societal one. Medicine and science can, and should, establish biologic realities, but cannot, and should not, establish sociologic ones. As an example, in a less inflammatory area than abortion, we can establish the viability of sperm and the impregnability of a female by modern methods, but cannot decide that spouses should or should not have an infant. If they and society decide that artificial insemination is an acceptable alternative to natural intercourse, then the physician can assist in a procedural fashion to aid their goals.

Further, medicine and science can continue to investigate the definition of death, once thought to be simple and straightforward, but now known to be a complex phenomenon. But medicine and science cannot decide by any biologic measure when and if life-support should cease or continue, nor can they decide alone whether a given "dead" individual can donate organs to a "living" person. For the latter decisions the physician/scientist must seek the consent and advice of the responsible relatives and act within societal guidelines as defined by statute, moral and ethical codes and religious and other philosophic considerations.

If S. 158 is enacted in its present form, possible consequences include:

1. A serious impairment to any form of post-conception contraception. Such procedures would be considered to deprive the conceptus of "life" under the 14th amendment and could be construed as murder.

2. Potential limitation on genetic counseling and screening. One could envision a situation in which knowledge detected and imparted could be construed as aiding and abetting deprival of 14th amendment rights to an as-yet-unconceived individual. Although far-fetched at first blush, is not conspiracy to commit murder punishable under our laws? If so, then might not it be considered conspiracy between physician and potential parents to deliberately avoid conception?

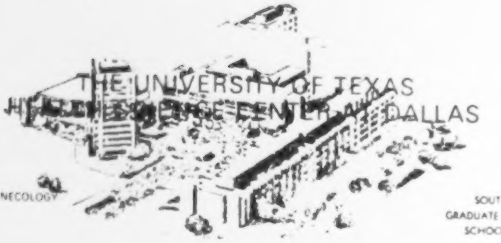
Other fanciful scenarios might be envisioned, but they all would be variations on the themes "murder" and "intent to commit murder" as defined by the right of all persons to "life".

I trust this personal view of an incredibly complex and emotionally charged area will be helpful.

Sincerely,

Vincent A. Fulginiti
Vincent A. Fulginiti, M.D.
Professor and Head
Department of Pediatrics

VAF:jj



THE UNIVERSITY OF TEXAS
HEALTH SCIENCE CENTER AT DALLAS

DEPARTMENT OF OBSTETRICS AND GYNECOLOGY

SOUTHWESTERN MEDICAL SCHOOL
GRADUATE SCHOOL OF BIOMEDICAL SCIENCES
SCHOOL OF ALLIED HEALTH SCIENCES

June 11, 1981

The Honorable Max Baucus
U.S. Senate
SubCommittee on Separation of Powers
Washington, D.C. 20510

Dear Senator Baucus:

I have given deep thought to the questions you put to me regarding S.158. In answer to your first three questions on when human personhood begins; who among us mortals in the professions can answer this question; and by what means can this be proven to the satisfaction of Congress at this time let me briefly respond. At this time, whatever the will of Congress, human life does not begin. It began in the very long distant past and has continued to the present by being transmitted -- not begun -- through reproduction. An ovum and a spermatozoan are alive and human before they meet. Live sex cells are part of people and fetuses, and represent an overlap of two generations in each individual and three in pregnant women. The union of an ovum and spermatazoan represent part of the process to the development of each human offspring and are part of a continuity of life and of generations, and gradual development of a fetus. Until the umbilical cord is severed there can be no "moment of conception" or human personhood since a person(hood) is an individual only when he is a single indivisible entity. An egg after a prolonged process of fertilization consists of a single cell called a zygote. A zygote must continue to divide if development is to continue, and thus cannot be an individual (or person). A conceptus is a fertilzed egg and everything that develops from it until it is born. A conceptus has two major components: embryoblast, most of which becomes fetus, and trophoblast, which becomes placenta, extraembryonic membranes and umbilical cord. The fetus, which is an unborn offspring, becomes a neonate or baby when it has come out of the mother, and it becomes a person, individual, when it is divided from the trophoblastic part of the conceptus by cutting the umbilical cord. The trophoblastic parts of the conceptus are alive, human, and have the same genetic components as the zygote, fetus, and baby. Thus, to use as criteria any of these terms as they appear in S.158 to define personhood legislatively would mean the normal practice of cutting the cord, interrupting the blood supply to the placenta, and letting the expelled placenta die might be murder without protection of the 14th Amendment in the eyes of the law. If this is exempted legislatively then it would appear that the statement on which it is based is not logically sound with our present knowledge of life, and personhood.

I would like to devote more time to question #4 and to the impact of S.158 if enacted. I am a married man, and taxpayer as well as an obstetrician and gynecologist. I feel after discussing this with a number of people that the simple language of S.158 by the drafters overlooks the perhaps unforseen complexities on our society, or any society in this world. I also feel not even the richest government in the world could afford the effect of this law. Let me enumerate my questions to which, I hope, someone has thought about the answers.

Economic:

1. Approximately 30% to 40% of all fertilized ovum are expelled by nature within the first menstrual cycle. Approximately 70% of all fertilized ovum are spontaneously miscarried due to a variety of circumstances but most commonly due to defects of the conceptus incompatible with surviving life, however defined. Thus, the question is, can a woman take up to 12 income tax deductions a year? If the spontaneous miscarriage is not due to any cause but to God, she had according to S.158 a dependent for a period of time. I know that it is medically impossible to ascertain up to a certain point in time whether there is or is not a pregnancy. If the IRS excludes the potential person it will of course be denying either the conceptus, the woman, and the father of property under the 14th Amendment. Can the government afford every woman of childbearing years who can demonstrate she ovulates the right to take a tax deduction based on her menstrual cycle's?

Social Security:

We are all aware of the present financial difficulties that the Social Security System faces. Will the proposed law worsen its financial condition? I ask this because of several problems that occur to me.

1. If physicians discover by sonography, or amniocentesis that the fetus has a serious defect (i.e., defective heart, other congenital anomolies, Down's syndrome, spina bifida or other neural tube defects, various genetic defects as Tay-Sachs, hemophilia, etc.) and since S.158 clearly makes it a duty to preserve this fetus regardless of health or defect by physician and woman alike it would seem appropriate that this defective fetus should at this point be eligible for Supplementary Security Income under Title XVI of the Social Security Act. Is this true? The cost of specialized care for severly defective neonates, and infants is often astronomical and since Medicaid is available to S.S.I. recipients will the federal and state governments assume this medical and financial support responsibilities?

2. Parkland Hospital is a large county hospital, and is the sole public hospital in Dallas County, Texas. My Department of Obstetrics and Gynecology has the responsibility for the prenatal care and deliveries of the 12,000 low income and indigent women who deliver at the County Hospital annually. Texas, along with 31 other states is not required by federal or state law at this time to pay for Aid to Families With Dependent Children (AFDC) to either a woman, or her fetus until it is born alive, and a birth certificate is presented to the State Welfare Department. It would seem that S.158 would require the federal and state governments by law to ensure that both adequate medical prenatal care is provided prior to delivery, and that the woman bearing the child has adequate food to eat so that the conceptus will not be malnourished during its prenatal development. We would be delighted if the federal government will ensure adequate monies for prenatal care to indigent women through federal and state appropriations. Since in Texas we only pay $37.50 a month to each A.F.D.C. recipient exclusive of Medicaid it will not be a very high cost in this state (only $75.00 a month for the two to live on.) Of course, I realize all states do not pay this low an amount, but there are social as well as economic implications to consider in S.158. We might for the first time in the U.S. have to pay enough for a poor pregnant woman to eat and get medical care in order to protect personhood. Will this unbalance state or federal budgets further than was planned before passage of this law?

Malpractice and Criminal Law:

1. What will my malpractice costs become in order to pay for suits on alleged prenatal injuries, spontaneous miscarriages I cannot prevent, including checking that the sperm of the potential father, and physical condition and age of the mother, taking a genetic history, etc., so that the father and mother are less likely to produce a miscarriage, or defective fetus?

2. What will I do if in my medical opinion and those of my colleagues, a pregnant woman will die if she carries a pregnancy to term? Do I report it to the district attorney so there can be an expidited jury trial so neither woman nor conceptus will be deprived of life without due process of law? Who decides this profound question -- or does S.158 mean the conceptus' life prevails over that of its mother prior to delivery? Does the district attorney indict me, the woman, or the conceptus if one of the two dies because of the pregnancy?

3. Do I have to testify against the viable baby who survives if the mother does not survive for matricide? Is it manslaughter, involuntary homicide, or murder as far as the surviving baby? Or vice versa what are the charges if the mother survives and not the fetus?

I am sorry to have asked so many questions of you since you originally wrote only four questions to me, but I feel that if Congress is seriously prepared to pass such a law it is only fair that as a citizen, physician, and taxpayer, I should know the consequences legally and economically to me and my colleagues. I do not know if many Senators are lawyers, but I know you make the laws. I feel S.158 attempts to solve simply a complex subject, and with many ramifications.I hope some of these problems will be considered before a final passage of the law.

With best wishes to you and your fellow committeemen on a subject that I personally had not considered within the purview of my elected officials.

Yours truly,

N Gant, M.D.

Norman Gant, M.D.
Chairman
Department of Obstetrics and Gynecology

NG:lmg

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Southern Illinois University
School of Medicine
P.O. Box 3926
Springfield, Illinois 62708

Department of Pediatrics

May 28, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for asking me to comment regarding S. 158. I have given considerable thought to the issues involved, and will attempt to summarize those thoughts, as given publicly last year in a talk at the University of Southern California. I have attempted to divorce my feelings, which probably are colored by my one-half Catholic and one-quarter Jewish background, from my scientific analysis, and have tried to look at the problem from the traditional viewpoint of the medical profession. I apologize for the length of the following, but the issues are very complex.

First of all, I resolutely defend the right to believe as one wishes. There is, however, a distinction between belief and conduct. There are many situations in which practices based on personal moral beliefs, as opposed to the beliefs themselves, have been limited or forbidden when they imperil another's life. For example, courts unanimously hold that life saving blood transfusions will be given to minors despite the sincere moral objections of parents who are Jehovah's Witnesses. It seems incongruous, then, that in the name of a parental right to privacy, the courts might permit the ultimate insult to another human, the taking of his life. The issues, of course, then revolve around the basic point raised in S. 158, and the preceding Supreme Court decisions:

1. Is the fetus in reality, a part of the mother's body, and thus subject

to being aborted under the
rubric of "the woman's right
to her body"?

2. Is the fetus a human being, or at what point does he become a human being?

To the first question, I must answer that it seems scientifically erroneous to suggest that the fetus is a part of the mother. Half of his/her genetic makeup is foreign, and indeed a different blood type may even provoke an antibody response by the mother.

The issue, then, is when does the fetus become a person, with legal rights under our constitution, and ethical rights to be respected by society in general, and by our profession in particular. The Supreme Court dodged the issue, but actually when it decided at the outset that the woman had a fundamental right to abort, it implied that the fetus had no fundamental right to life, and thus raised the presumption that the fetus is not a person. Since the 14th Amendment does not specify whether the fetus should be included in its provisions, I believe that the court neglected its obligation to decide upon this crucial issue. Even if it had issued such a decision, however, millions of our citizens would probably not have accepted it no matter which way the issue was decided. I believe that laws and courts cannot resolve issues that are probably moral or ethical ones, and I doubt that the congress or the Supreme Court can alter behavior about abortions anymore than they were able to alter behavior regarding the use of alcohol.

Are there, then, any ways of resolving the disparate views of the developmentalist and the conceptionist? The former view was implicitly defended by the Supreme Court, and essentially holds that human status cannot be ascribed to the fetus until sometime along the course of development. Unfortunately, the appropriate time has varied from approximately when the fetus looks and physiologically functions as an adult to the time of viability. A few extremists suggest that the postnatal ability to relate socially, or even to reason, should define the person with full rights as a human. This difficulty in drawing a clear dividing line obviously creates technical, legal, moral and administrative problems.

The alternative, or conceptionist, viewpoint is that human beingness begins at conception. This intuitive belief is shared by many, including the joyful parent upon recognizing the fact of pregnancy. Our own current insistence that the "rights" of the unborn, during the period of organogenesis, be protected at the expense of the mother's "right", for example, to drink alcohol, smoke cigarettes to excess, etc. suggests strongly that weakness of their basic contention. Even without the religious or bibical tradition, one can sense a human tradition that suggests that the unborn, as well as the newborn infant, is a human being, a person, and thus deserving of care and protection. We are obliged to protect the sick, the disabled, the useless, the aged, so why not the unborn? Again, the support from the religious ethicist is strong, since our responsibilities are said to be especially great to "the least of them". This certainly describes the fetus, who is silent and cannot claim his rights as a human being. The emphasis on such rights raises real legal issues, whereas an emphasis on societal responsibility places the focus on the ethical nature of the issue.

As a physician, I cannot ignore the many scientific, economic, and practical reasons for favoring the use of abortion, from the narrowly defined "therapeutic abortion" or the removal of a fetus known to be malformed or abnormal, to the unlimited "abortion on demand" permitted by today's legal climate. On purely ethical grounds, however, not religious ones, I personally have difficulty accepting the concept of abortion as a legitimate or desirable activity for physicians, and in separating the termination of a three month pregnancy because the fetus is abnormal from killing a three month old infant with the same abnormality.

With that background, I can attempt to answer the four questions that you posed. It will be apparent from the above that I believe that the question of human personhood is medical, scientific, moral, ethical, philosophical, religious and political. Though medical and scientific data alone probably cannot determine what the definition of human personhood should be, I believe that such data repute the argument that the fetus is a part of the mother's body. It is difficult for me to determine what the impact of S. 158 would be, since it seems to me that the courts, in interpreting the law, could still determine that one person's life is more valuable than another's, and permit abortion under the circumstances that many of my medical colleagues would think appropriate. I see no way that this influences the use of contraceptives, since it would be difficult to argue on behalf of the rights of the unconceived, as one can on behalf of the rights of the unborn.

I apologize for the length of the above, and for the fact that it almost certainly does not satisfactorily answer the questions that you posed. I am opposed to abortion on the basis of my interpretation of medical ethics, as well as on the basis of my personal beliefs. I sincerely doubt, however, that passing any kind of law will be particularly helpful in resolving these very fundamental and important social issues.

Sincerely,

JMGarfunkel

Joseph M. Garfunkel, M.D.
Professor and Chairman

JMG/plb

LOUISIANA STATE UNIVERSITY
MEDICAL CENTER
1901 Perdido Street
New Orleans, LA 70112 - 1393

1981 OCT -9 AM 8:00

Department of Anatomy

October 5, 1981

Senator Max Baucus
U.S. Senate
Washington, DC 20510

Re: Senate Bill S158

Dear Senator Baucus:

Responses to the question "When does human life begin?" sometimes point out the differences that exist between the concept of phylogenetic development (origin of the human species) and ontogenetic development (origin of the human individual). To say "Life does not begin but is continuous" is observing life from the phylogenetic viewpoint. Perhaps a better way of asking the question from the ontogenetic viewpoint is "When does an individual's life begin?", or "When did my life or your life begin?" To this question there can be but one answer. Scientifically, it is abundantly clear that individually specific, human life (like mine and yours) began at the moment of conception when a sperm from our father united with the ovum from our mother to form our first cell. No clear thinking biologist would deny that the first cell of each of us began at that moment (conception or fertilization) in our mother's uterine tube. Likewise, every biologist would have to agree that our first cell had to be living, had to be distinctly human and contain all of the unique genetic information that presently exists within each of us. Although our first cell gave rise to some tissues that are no longer a part of us such as protective membranes and deciduous teeth, there should be no denying that it was our first cell.

For the past 20 years my research efforts have been devoted mainly to the prenatal (ontogenetic) development of man and, to a lesser extent, subhuman primates. I have studied human embryos at every stage of development. These research efforts have led me to conclude that at every period of an individual's life (whether it be fertilized ovum, embryo,fetus, infant, child, teenager or adult), it is always possible to identify the developing "mass" as human rather than monkey or any other animal. After the eighth post-conception week (fetal period begins)"humaness"is easily determined with the naked eye. Earlier, many microscopic differences exist that distinguish human from monkey embryos (second to eighth post-conception week). No cell biologists could dispute the fact that even the fertilized ovum of the first week contains chromosomes and proteins that can be identified as distinctly human. Neither could one dispute the fact that the first cell of each of us was living, human and genetically specific for each of us.

During the past 20 years I have also studied and taught the adult arrangement of the human body to over 2500 medical students in the dissecting lab. While it would be simpler to believe that beneath the skin we are all structurally alike, anyone who has ever had the experience of dissecting the human body fully realizes how individually specific each of us really is structurally, from the surface of the body to its inner depths. Other than identical twins, has anyone ever seen two faces that are identical? Likewise, no one

School of Allied Health Professions School of Graduate Studies School of Medicine in Shreveport
School of Dentistry School of Medicine in New Orleans School of Nursing

will ever see two identical blood vessels, nerves, muscles, etc. As amazing as this is, it is even more astounding to realize that, with few exceptions, every named structure we study in the dissecting lab was present in the body by the eighth post-conception week.

There is more than ample scientific evidence to prove that an individually specific, human life begins at the moment of conception. It is hard to conceive how any biologists could believe otherwise. It seems that the real question we are trying to answer is "How valuable is human life?", particularly those early stages before birth that nonbiologists know little or nothing about. While I have unanswered questions about many aspects of life, one thing I have no doubts about and that is the value of my first cell. To me, it was most valuable and I am reasonably certain that you hold the same value for your first cell. Reasonably intelligent, healthy individuals do not really question the importance of their own existence. What we as a nation must now decide is how valuable are "theirs" and how perfect must "theirs" be before it is valuable enough to protect?

Raymond F. Gasser

Raymond F. Gasser, Ph,D.
Professor of Anatomy
Louisiana State University
School of Medicine

cc Dr. Robert L. Brent
Editor, Teratology

THE UNIVERSITY OF MICHIGAN
MEDICAL SCHOOL

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37 E. CATHERINE STREET
ANN ARBOR, MICHIGAN
48109

TELEPHONE:
ANN ARBOR, 764-5490

1981 MAY -6 AM 10:00

May 1, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing with respect to the hearing being held by Senator East on Senate Bill 158. As a physician and medical geneticist, I am concerned that biomedical science is being abused in an effort to justify a moral or religious position. Dr. Leon Rosenberg, who testified before his committee, was, I believe, quite correct in stating that the question you have posed is beyond the reach of science. Scientific evidence would suggest that life is a continuum, that living cells including both sperm and egg all contain the essential elements of life. This however, is a very different question from that of when meaningful human life begins. Medical science can define approximately when the human fetus is capable of exiting outside the womb, and such information is incorporated into legal definitions of "viability." However, there is no scientific evidence that would justify a position that "meaningful human life" begins at fertilization. Such a definition remains in the province of morality, ethics, and religion. If one wishes to define the beginning of meaningful human life legally, it seems to me inappropriate to misuse scientific information to support that position. If the Congress wishes to impose such a highly personal ethnical decision upon the public, it must do so openly and honestly. Attempting to support such a position with testimony from selected witnesses who haven't the knowledge or credentials (excepting Drs. Lejuene and Bongiovanni) to even provide useful information on the subject makes a mockery of the legislative process.

As a medical geneticist, I am well aware of the significant benefit provided by prenatal diagnostic techniques for couples at high risk of bearing a child with serious disease. Prenatal diagnoisis by amniocentesis has been proven to be highly accurate and safe. For a small minority of families undergoing this procedure, a difficult decision about terminating an affected pregnancy must be faced. For the vast majority of women undergoing this procedure (more than 95%), the outcome is reassurance and continuation of a pregnancy known to be unaffected by the disease in question. I hope you will seriously consider the results that Senate Bill 158 will have on such families.

The issue with which you are dealing is a very important and very difficult one. I hope you will approach it with openness and honesty, and not attempt to bolster an ethical decision with illegitimate science.

Sincerely yours,

Thomas Gelehrter

Thomas D. Gelehrter, M.D.
Director, Division of Medical Genetics
Professor of Internal Medicine and
Human Genetics

TDG/jw

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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DEPARTMENT OF PEDIATRICS

UCLA SCHOOL OF MEDICINE
HARBOR-UCLA MEDICAL CENTER
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TORRANCE, CALIFORNIA 90509

June 11, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

I have just received your letter of May 13th.

In response to your questions concerning S.158, I believe that the issue of human personhood is complex and inculcates elements of philosophy, religion and biomedical science with an enormous current and historical impact upon morals, ethics and politics.

If S.158 is enacted, I predict substantial change in the timing and incidence of therapeutic abortion, an attenuation of genetic screening to preconceptional and immediate gestational periods, and the cessation of some components of contraception. If philosophers, theologians and scientists are able to coalesce data which can support the notion that, while life begins at conception, human life, as witness to the biological concept of ontogeny recapitulating phylogeny, evolves at 8 to 10 weeks of gestation, parents and physicians may be able to focus scientific technology in swiftly coordinated fashion on the initial embryonic phase of pregnancy and sustain elements of therapeutic abortion for rape, incest, and calamitous biochemical and morphologic genetic disorders. This will be very difficult but may be possible.

With kindest regards,

Sincerely,

Joseph St Geme

Joseph W. St. Geme, Jr., M.D.
Professor and Executive Chairman
Department of Pediatrics
UCLA School of Medicine

JWS:nn

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE
2160 South First Avenue, Maywood, Illinois 60153 312 531-3000

May 27, 1981

Senator Max Baucus
United States Senate
Washington D.C. 20510

Dear Senator Baucus,

I appreciate your letter of May 13, 1981. I will be happy to answer your questions but it should be understood that my answers represent only my own opinion. In particular, I do not speak for Loyola University Stritch School of Medicine or for its Pediatric Department.

I do not think that the question of human personhood is a medical or scientific question. Human life could be defined as beginning at conception or it might be defined as beginning at birth. I do not think that being a doctor makes my opinion superior to that of any informed layman on this subject.

It is my view that the question of human personhood is in part a moral, ethical, philosophical, religious and political question.

Question 3. Answer no.

Passage of this Bill would have profound effect upon a number of facets of life in the United States. The most widely used methods of contraception, specifically the pill and intrauterine devices, would become illegal. The legal forms of contraception would consist primarily of condoms, diaphragms, the rhythm method, and abstinence. Except for abstinence, the methods which would be legal are not particularly reliable. Genetic screening would not be useful except to the extent that patients accepted the legal method of birth control. Amniocentesis would be of no value since its use can only lead to abortions. Medical practice would be changed in a number of ways. We would attempt to treat a larger number of children who were unwanted by their natural parents. That is, the children of teenagers and unmarried women. We would also have a greatly increased number of patients suffering from the effect of illegal abortions. Since more teenage pregnancies would go to term, we would have increased incidence of premature babies and children suffering from the residual defects secondary to premature delivery. The great diminution in the effectiveness of genetic counseling would have a great effect on medical practice. Currently, genetic counseling attempts to prevent the birth of children with extremely severe mental and/or physical defects. If this law is passed these children will require a great deal of medical care.

In summary, I think this law has very far-reaching implications. It will effect the lives of most citizens. I have been surprised that it has not received more publicity.

Sincerely,

Lewis E. Gibson MD.

Lewis E. Gibson, M.D.
Professor and Chairman
Department of Pediatrics

LEG/cg

DEPARTMENT OF PEDIATRICS
THE UNIVERSITY OF UTAH & PRIMARY CHILDREN'S MEDICAL CENTERS

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Adolescent Medicine
A. B. Elster, M.D

Ambulatory Pediatrics
D. J. Green, M.D
T. J. Metcalf, M.D
W. M. Palmer, M.D

Behavioral Pediatrics
E. H. Wender, M.D

Cardiology
R. L. Bucciarelli, M.D
F. Krabill, M.D
G. S. Orsmond, M.D
H. D. Ruttenberg, M.D
L. G. Veasy, M.D

Endocrinology & Metabolic
B. A. Buehler, M.D
M. O. Rallison, M.D

Gastroenterology
L. S. Book, M.D
J. J. Herbst, M.D

netics
A. Buehler, M.D
Carey, MPH, M.D
M. Fineman, M.D., Ph.D

Hematology-Oncology
B. L. Bybee, M.D
E. M. Lahey, M.D
R. T. O'Brien, M.D

Infectious Diseases
L. A. Glasgow, M.D
H. R. Hill, M.D
J. M. Matsen, M.D
J. C. Overall, Jr., M.D

Immunology & Allergy
H. R. Hill, M.D
S. H. Pincus, M.D
A. O. Shigeoka, M.D

Neonatology
C. L. Bose, M.D
R. L. Bucciarelli, M.D
G. M. Chan, M.D
R. D. Christensen, M.D
J. L. Dolcourt, M.D
T. R. Harris, M.D
A. L. Jung, M.D
V. Roan, M.D
M. L. Wyman, M.D

Nephrology
R. L. Siegler, M.D

Neurology
P. F. Bray, M.D
J. A. Madsen, M.D
J. A. Thompson, M.D
F. A. Zaer, M.D

Pediatric-Child Psychiatry Liaison
C. K. Berenson, M.D
T. A. Halversen, M.D

Surgery
Johnson, M.D
Matlak, M.D

1981 JUN -8 PM 4:57

June 3, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This letter is in response to your recent correspondence concerning the hearings on S. 158 being held by the Senate Judiciary Committee SubCommittee on Separations of Powers. I do not believe the the question of human personhood is a medical or scientific question. Scientific facts and medical knowledge may be used to define physiologic function, but the interpretation of that information is religious, ethical, philosophical and, unfortunately, increasingly political. S. 158 has tremendous and complex implications for the practice of medicine in opposition to the basic tenets upon which our nation was founded. It superimposes the ethical, philosophical and religious beliefs of a minority on the remainder of the nation. It could remove personal choice and adversely impact on deeply personal medical decisions between doctor and patient. Depending on interpretation, it may prohibit certain methods on contraception which are safer than the pill and may prevent the development of post-conceptual methods of contraception which could potentially have less side effects. The potential for making genetic diagnosis and development of methods of treatment for certain genetic abnormalities may be adversely affected.

Perhaps most disturbing is the development of a simplistic solution to deeply personal and extremely complex medical decisions based on the ethical, philosophical and religious beliefs of a minority component of our population.

Sincerely yours,

Lowell A. Glasgow, M.D.
Professor and Chairman
Department of Pediatrics

LAG:ld

THE FOX CHASE
CANCER CENTER

7701 BURHOLME AVENUE • PHILADELPHIA, PENNSYLVANIA 19111 • 215/342-1000

CARLA GOEPP, M.D.
LYNN GODMILOW, M.S.W.
GENETIC COUNSELING
215/728-2715

April 21, 1981

1981 APR 24 PM 12:01

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Re: S. 158

Dear Senator Baucus:

I have just received your request for my opinions as a medical and scientific expert in regard to the question of when human personhood begins. I have spent the last 10 years of my professional career dealing with this issue in one form or another as a genetic counselor.

I cannot state strongly enough that I feel human personhood begins with viability. By viability, I mean that the individual conceived has the capacity to survive as an independent person. My definition means that if a fetus has been determined to have a problem which will forever render that life as unaware and dependent on society for survival, those persons (the parents, especially and primarily the mother) responsible for sustaining that survival should have the final say about that life's personhood.

Until and unless society is willing to totally assume the burden of care for all unwanted conceptions and until it is completely acceptable by our society for a woman to bring a child into the world and then turn it over to the care of others, I do not feel Congress or anyone else has the right to say that she should be forced to continue an unwanted pregnancy.

There is no doubt in my mind that human personhood involves questions and issues that are medical, moral, ethical, philosophical and religious. But they are questions properly in the domain of the pregnant woman and her physician.

I hope that I have been helpful to you and that you will do all in your power to prevent this legislation from becoming the law of the land.

Sincerely,

Lynn Godmilow, M.S.W.
Genetic Counselor
Coordinator, Clinical Genetics

LG/kas

THE AMERICAN ONCOLOGIC HOSPITAL • THE INSTITUTE FOR CANCER RESEARCH

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SCHOOL OF MEDICINE
DEPARTMENT OF OBSTETRICS, GYNECOLOGY
AND REPRODUCTIVE SCIENCES
ROOM M-1480

SAN FRANCISCO, CALIFORNIA 94143

April 25, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
The United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I write because of a great concern that Congress is considering legislating what should be accepted as "scientific fact". This represents a two hundred year step backwards in government. I am referring to the Subcommittee on Separation of Powers hearings regarding the likelihood that human life exists from conception.

As a reproductive geneticist I feel that there is no scientific evidence supporting the proposition that human life begins at conception. Scientifically, there is no reason to differentiate the unfertilized ovum from the fertilized one cell zygote. Both have the same potential - if a number of biologic requirements are met. In fact it is only this potential that makes a germ cell (ovum or sperm) different from a skin cell or liver cell. There is nothing inherently different in the material of inheritance (DNA) in any of these cell types. It is confusion of this potential with what actually exists which has led to the emotional investment in this entire issue.

More broadly, there are no scientific techniques for determining when "personhood" first exists. This is not so much a scientific or medical question as it is one of ethics and philosophy. The definition of human personhood requires much more consideration of our philosophical and ethical beliefs than it does any medical or scientific data.

On a practical level, the passage of S. 158 would contradict the use of intra-uterine devices and many low dose birth control pills for contraceptive purposes. Both of these techniques affect the zygote/embryo - e.g. after fertilization. The only birth control pills allowable in such a situation would be "higher dose" preparation with their known higher risk of thromboembolism in the patient. This bill (S. 158) would require women to take a more dangerous form of oral contraception with more risk to their lives.

I feel that the issues of pregnancy, pregnancy termination, and individual rights rightly deserve consideration by both the public and Congress. However, a bill such as S. 158, falsely based on "scientific information" which does not exist, would be to the detriment of all our citizenry.

The Honorable Max Baucus
April 25, 1981
Page 2

I would appreciate being kept aware of the proceedings in these hearings, and if I can be of any service, please let me know.

Sincerely,

Mitchell S. Golbus, M.D.
Chief, Reproductive Genetics Laboratory
Associate Professor of Obstetrics, Gynecology
and Reproductive Sciences

MSG:fd

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF MEDICINE
DEPARTMENT OF PEDIATRICS
DAVIS, CALIFORNIA 95616

Please reply to
DEPARTMENT OF PEDIATRICS
UC DAVIS MEDICAL CENTER
4301 X STREET
SACRAMENTO, CALIFORNIA 95817
(916) 453-2779

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Max Baucus:

I appreciate the opportunity to express my opinion concerning S 158. In response to your specific questions:

1. I do not believe that the question of human presonhood is a medical or scientific question.

2. The answer to that question is in large part a moral, ethical, philosophical, religious and political matter. Physicians are people who frequently have difficulty separating emotional or religious matters from science.

3. I do not believe that medical and scientific data can result in a proper definition of human personhood. There is a difference between a living cell and a person and that judgement requires more than scientific information.

4. If S 158 is enacted there will be a significant decrease in the availability for those who can not pay. I am particularly concerned about abortions following rape, for genetic indications, and termination of undesired pregnancies in the young (12-13 year olds) or those incapable of bringing a pregnancy to term without significant risk to their own health.

I doubt there will be any effect on contraceptive use.

I feel strongly that the matter of human personhood or performance of abortion should be determined principally by the pregnant woman.

Sincerely,

EGold

Eli Gold, M.D.
Professor of Pediatrics

EG/kr

MCG

Medical College of Georgia
Augusta, Georgia 30912

School of Medicine
Office of the Dean and Medical Director

1981 JUN -1 AM 10:21

May 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

In reply to your letter of May 13 concerning the Bill S.158, I would make the following responses to your four questions:

1) No

2) Yes

3) No

4) It is my personal belief that the enactment of S. 158 would be a grave mistake. While I am not necessarily in favor of indiscrimate abortion, nonetheless, legal abortion should be available for victims of rape or incest, for mothers who are bearing fetuses with proven genetic defects, and in instances where it can be shown that the bearing of a child to term would adversely affect the mental or physical health of the mother.

The questions you ask are obviously complex and difficult and I believe that, if you haven't done so already, it would be of considerable help to your committee's deliberations to contact the Hastings Center, 360 Broadway, Hastings on the Hudson, New York 10706. The Hastings Center is an Institute of Society, Ethics, and the Life Sciences and plays a central role in raising these issues as a response to advances in medicine, the natural sciences, and the social and behavioral sciences.

I hope this information will be of some value.

Yours sincerely,

F. Goodale

Fairfield Goodale, M.D.
Dean and Medical Director

DR. HAROLD GOODMAN
4753 BROADWAY
CHICAGO, ILL. 60640

1981 APR 24 AM 11:55

4-20-81

Senator Max Baucas
Senate Post Office
Washington, D.C.

Dear Senator Baucas:

I note that H.R. 900 is now being considered by the House Judiciary Committee. Although I am sure that Representatives Hyde and Mazzoli considered the bill and its wording very carefully, the intent of the bill is clearly to prevent all abortions whether elective or medically needed.

What other legal mischief may result is unforseen at this time, but will certainly be considerable.

As a pediatrician in practice for many years, my thoughts and feelings are obviously for the best interests of the infant and its mother. This bill will not serve that intent. Its effect will be malicious and destructive of the quality practice of medicine. It is not possible to legislate science as this bill attempts to do; only in the Soviet Union can this be done.

I am firmly opposed to this legislation. If you have any questions concerning my feelings or the facts involved, please feel free to call me.

Sincerely,

Harold Goodman, MD

Harold Goodman, M.D.

HG/kg

WAKE FOREST UNIVERSITY

BOWMAN GRAY SCHOOL OF MEDICINE

300 South Hawthorne Road • Winston-Salem, North Carolina 27103

Department of Pediatrics
Section on Medical Genetics

1981 JUN -1 PM 2 15

May 26, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Dr. Jimmy L. Simon, Chairman of the Department of Pediatrics, has asked that I respond to your letter because Bill S. 158 will have great impact on my area of expertise, medical genetics. Further, our views on this matter coincide. First, let me briefly provide simple answers to your complex questions:

1. We do not believe that human personhood is primarily a medical and scientific question.
2. We believe that human personhood is primarily a moral, ethical, philosophical and religious question.
3. We do not believe that medical and scientific data alone can determine what human personhood should be in the present context.
4. If my reading of the bill is correct, it would no longer be a decision for the family as to whether a pregnancy involving a defective fetus detected via amniocentesis, sonic scanning or other modalities be brought to term. Some due process procedure would be necessary before any pregnancy could be electively terminated. Similarly, in case of incest or rape, a due process proceeding would be required. The bill, if I read it correctly, would essentially eliminate all options except as due process procedures might be established for such special cases.

Hence, the bill would essentially terminate antenatal diagnosis unless due process were to be established. Of course, no one can predict whether such enabling statutes would be created, but without them, most choices regarding continuation of pregnancy would be eliminated.

We detect ten to fifteen abnormal fetuses per year for which we can with essential certainty predict the pregnancy outcome. For instance, fetuses with Tay-Sachs disease will be born only to die a lingering death at 2 to 4 years. Anencephalics will be stillborn (90 percent) or die within a few hours to days after birth. Fetuses with chromosomal aberrations will die within a few months of birth (average of 90 days survival for Patau's syndrome, trisomy 13; and Edward's syndrome, trisomy 18). Fetuses with Down's syndrome (trisomy 21) will be mentally retarded like almost all fetuses with autosomal chromosomal aberrations and live many years though many will require heart surgery to survive. Even among Down's fetuses, 60 to 70 percent will not survive to be born. Most parents (95 to 98 percent) who face these problems elect abortions.

Presumably, these parents of all religious faiths are electing abortion on the basis of consequential ethics; i.e., the suffering for the fetus in its death in utero are less than its later suffering and the suffering for the family as a whole. I find few parents who make such an election earily and have counseled many families following the abortion because of their mixed feelings about their choice. Clearly, the questions posed by the bill are moral, ethical and religious. The Christian view has varied widely as evidenced by the various papal encyclicals which have at various times forbidden abortion, specified times before which it was a venal or cardinal sin, etc. One Judeic tradition held that an infant is not fully human until 30 days after term, presumably minimizing the impact of previous high rates of neonatal deaths both psychologically and financially (a funeral need not be held).

In reading literature on abortion, it became clear that the practice is as old as recorded history and there is, of course, no absolute way to prevent them, only avenues making them less safe. For instance, in a book written in the last century, two British physicians opposed to abortion presented data indicating that over half of all pregnancies in France during the period 1840 to 1855 terminated in induced abortions. Abortion is, of course, a final and for many women a desperate solution to an unwanted pregnancy. However, I believe on balance it is more moral to provide a safe option for desperate women rather than forbid by law the inevitable. With common knowledge of the increased risk of chromosomal aberrations among older mothers (over 35 years), I believe many today would terminate their often unplanned pregnancies whatever law might be enacted. Hence, the presently available options are often life-preserving and probably lead to fewer deaths than would otherwise occur, fetal and especially maternal.

Please forgive this somewhat lengthy reply, but you can clearly see that we are opposed to the proposed legislation, believing that until more moral options are available, we should preserve the families' rights to choose. I am especially incensed by the lack of any provision for the case of rape or incest, both of which generally result from unwilled acts and would with the new law impose involuntary parenthood of numerous hapless women.

Sincerely,

Harold O. Goodman

Harold O. Goodman, Ph. D.
Professor and Head
Section on Medical Genetics
Department of Pediatrics
Bowman Gray School of Medicine
of Wake Forest University

HOG:bc

INDIANA UNIVERSITY
SCHOOL OF MEDICINE

DEPARTMENT OF PEDIATRICS
James Whitcomb Riley Hospital for Children A-568
1100 West Michigan Street
Indianapolis, Indiana 46223
(317) 264-

1981 JUN -4 PM 2: 05

May 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I appreciate very much your thoughtful letter of May 13 and the opportunity to offer you my evaluation of S. 158.

1.) I do not believe that the question of human personhood is a medical and scientific question.

2.) It is my view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question.

3.) I do not believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context.

4.) In my judgment, S.158, if enacted, would make impossible amniocentesis and would vitiate genetic screening. That markedly regressive step would bring great sorrow and grief to many infants and their parents.

I do not see in the Act any specific reference to the use of contraceptives but to prohibit their use would be a human disaster. The results of this bill would be massive increase in illegal, back-alley abortions with the resultant immense danger to the health and life of thousands of young women. This would be a national tragedy of great proportions.

Thank you again for the opportunity to express my views.

Sincerely,

Morris Green, M. D.
Lesh Professor and Chairman

MG:gc

WAKE FOREST UNIVERSITY

BOWMAN GRAY SCHOOL OF MEDICINE

300 South Hawthorne Road • Winston-Salem, North Carolina 27103

Department of Obstetrics & Gynecology

May 29, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your letter of May 13, 1981, I should like to offer the following in answer to your questions.

1) I do not believe that the question of human personhood is a medial and scientific question.

2) There is no question that human personhood is indeed a mixture of moral, ethical, philosophical, religious and political viewpoints.

3) Since human personhood is such a vague concept, I cannot see how medical and scientific data alone could determine its definition.

4) Prior to liberalization of abortion, we have good knowledge that a large number of illegal abortions were performed annually in this country. This often resulted in severe morbidity and/or mortality and resulted in a significant cause of maternal mortality each year. The CDC has closely monitored morbidity and mortality of abortion procedures and as you know, there has been significant reduction in both of these categories. It is my opinion that if S.158 were enacted, we would be thrown back to pre-legal abortion days and that we would have a resurgence of the problems previously extant. One of the significant advantages of legal abortion has been that physicians have increased flexibility to properly counsel and manage patients without legal constraint. Obviously S.158 potentially could destroy this flexibility. Carrying the potentials further, I could see a complete destruction of genetic screening programs since even if an individual were found to be genetically abnormal, there would be little we could do about it. It would be tragic to see constructive technology such as has been developed serve no useful purpose to mankind.

MEDICAL CENTER [illegible]
[illegible]
[illegible] Opportunity [illegible]

Finally with respect to the use of contraceptives, it would seem apparent that conception occurs with IUDs but that implantation does not occur. Granted this is a very fine line but I could foresee that the use of such contraceptive devices could be banned.

In sum, I am totally opposed to Congress infringing upon the rights of women and men in this regard and am totally opposed to S.158.

Very sincerely yours,

Frank C. Greiss, Jr., M.D.
Professor and Chairman

FCGjr:rts

cc: Senator Jesse A. Helms
Senator John East

COLLEGE OF MEDICINE
DEPARTMENT OF PEDIATRICS
LE BONHEUR CHILDREN'S MEDICAL CENTER
848 Adams Avenue
Memphis, Tennessee 38103
(901) 528-5945
522-3292

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of
 Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am responding to your letter of May 13 in which you asked for some feedback regarding the subject of the beginnings of human life. I note in your letter you use the phrase "human personhood", which I will assume is the same as human life.

I have read the proposed bill, S.158 and really find nothing in it to contest from my vantage point as a physician concerned with the care of human beings. More specifically, I have always thought that the argument about when life actually begins is an artificial one since, viewed in the strictest biologic sense, it has to begin when cells start to multiply and differentiate and only ends with death, when that process of cell turnover ceases.

In recent years we have witnessed remarkable advances in perinatal medicine. It is now possible for a fetus of a few hundred grams to survive and develop quite normally. A few years ago this aged fetus would be considered previable and, for some, would not have been entitled to our very best efforts to sustain that life. Does life begin when the heart starts to beat, the brain starts to myelinate or the optic vesicles start to form? All such arguments are really empty rhetoric in my view. Admittedly, a fetus of a few weeks or days is not viable outside of the uterus, but then again many fetuses of twenty or twenty-four weeks gestation are similarly not viable without comlex, expensive medical technology, which is not available in most countries. Are we to imply that the definition of human life is dependent upon the technological developments in a given society, or is it something that transcends mechanics, economics or scientific expertise? In my view, life begins with conception and ends with the abolition of cellular activity in the central nervous system.

In response to the questions you pose in the letter, I will be brief. I do not believe that the question of the beginning of human life is a medical or scientific question, because neither medicine nor science designs nor even fully understands the marvelous mystery of how two cells can multiply in such an orderly fashion to form a human being. It is in major part a moral, ethical, philosophical and religious issue, and only to the extent that there are forces which defy this viewpoint does it become an issue for the politicians. Medicine can describe in greater scientific detail the molecular biology of embryogenesis, but cannot or should not become judgemental about the basic process and particularly when it should occur. If this law is enacted, I think it will be a clear signal to the world that this country, which has historically stood for basic freedoms and the right to life, will still be honoring those principles. I do not think it will impact seriously on genetic screening for legitimate medical reasons. I believe the issue of abortion for life-threatening illness to mother or unborn infant is another order of problem which calls for medical input and, under certain circumstances, can be defended. I don't think this should be confused with the important principle being addressed in this bill, and I hope your colleagues will agree.

I am concerned like most citizens about the societal problems resulting from diminished productivity, growing unemployment, teenage pregnancy, the growing national debt and the many social ills which now crowd our world and threaten our future. I know that many feel that we should arbitrarily make rules to limit the birth process or at least encourage that practice as a means to help solve some of these problems. I think that is shortsighted and is addressing the effect rather than the cause of a problem which is extremely complex. I hope you will communicate this view in your upcoming discussions in the Senate.

Sincerely,

John. Griffith

John F. Griffith, M.D.
Professor and Chairman
Department of Pediatrics

JFG/pr

Duke University Medical Center
DURHAM NORTH CAROLINA
27710

DEPARTMENT OF BIOCHEMISTRY

1981 MAY 28 AM 10:27

May 26, 1981

Senator Max Baucus
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to give you my views on the complex and difficult questions raised by S. 158.

My background is that of a PhD with 30 years experience in the study of genetics at the cellular and molecular level and 20 years of teaching Genetics in the Medical School of Duke University. In this capacity I and my colleagues have tried to convey to the students the scientific bases of genetics and to use these to give perspective on where science ends and broader questions of policy and human values must enter. The present controversy and the legislation proposed by Senator Helms in S. 158 clearly fall in the latter realm.

On your specific questions, my views are:
1) Human personhood and when it begins are not questions answerable in the strict scientific and medical sense. 2) These questions are very much in the realm of non-science, involving but not limited to morals, philosophy, ethics, religion, and politics in the broadest sense. 3) Human personhood cannot be defined by the sole use of medical and scientific data. Potential to become a person in the future is one matter - when it is achieved is another on which people of good will can disagree.

With respect to question 4), the impact of S. 158 if it should be enacted, I foresee the following: The practice of medicine cannot help being altered severely by the elimination of the physician's opportunity to prevent the occurrence of a great variety of medical problems, many of which will become social problems needing attention and funds both for the care of the parents and of the children who might not have been born. Much current effort now goes to preventive medicine, and more should, leading to avoidance of problems ranging from the organic to psychiatric and social. The present legislation would increase the need for post facto care of both the infants and their parents.

Genetic screening as now practiced would be almost totally eliminated, leaving only the advisory service to potential parents before they attempt to have children. If they should decide the risks are too great, either for themselves or for the potential child, they would be forced to abstain from sexual practice, adopting the view of the Roman church, or to rely on a limited set of contraceptive methods that have not proven reliable in the past. Most or all of modern developments in contraception would be eliminated by this legislation, with the certain result that the present large number of unwanted pregnancies would increase.

(continued)

Senator Baucus, p. 2

Speaking now as a concerned layman, I see the questions addressed by S. 158 as involving human rights, primarily of the mother, of the father *if* he is a concerned partner rather than a rapist, and of the fetus *when* it becomes a person. Society in general, as a political body, should become concerned only in its role of maximizing the quality of human life, and this quality is most precious in its emphasis on the freedom of the individual. Certainly this last has been the central strong point of our American way of life, and I see this legislation as threatening it.

Secondarily, but by no means trivial in these times, society must be concerned with overall costs in the economic sense and who is to pay for them. Those who would add dramatically to these costs by the present legislation automatically assume responsibility to increase the federal budget to pay for the post facto welfare programs that will be needed, to say nothing of specific medical care for the handicapped children that will be born. The saving in federal funds by refusing to pay for abortions will be small by comparison and truly deserves the term "penny wise, pound foolish".

When human personhood begins is a question that cannot be answered in medical or scientific terms. I view the present bill as an attempt by one group to impose its moral and religious views on the once free American society by a political act. If this group can prevail politically, it must then accept full responsibility for *all* the social and economic implications of its actions. Much of past medical progress will be cast aside and we shall return to the "old days", which were not always good.

Sincerely yours,

Walter Guild

Walter R. Guild
Professor and
former Director of the
Duke University Program in Genetics

THE MOUNT SINAI MEDICAL CENTER
ONE GUSTAVE L. LEVY PLACE • NEW YORK, N.Y. 10029
Mount Sinai School of Medicine • The Mount Sinai Hospital

S. B. Gusberg, M.D., D.Sc.
Professor & Chairman
Department of Obstetrics and Gynecology

April 21, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
U. S. Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am very pleased to respond to you concerning the bill, S.158 sponsored by Mr. Helms.

I think medical and scientific expertise might throw some bearing on when life begins, but they cannot define the meaning of life in the sense of a person legal or moral or otherwise. I do not believe that personhood can be equated with life because life can be maintained in a test tube, that is, in cell culture and living organisms run up and down the scale of living things without relating to persons.

Therefore, it is my view that human personhood is, in fact, a moral and philosophical question, rather than a political one. I do not believe that medical and scientific data alone are able by any means to determine what is the definition of human personhood.

I believe most scientists and physicians who are free of moral or religious bias concerning the implications of this bill will agree that personhood exists when that form of life relates in a human way to another human being.

I send my best wishes.

Sincerely yours,

S. B. Gusberg, M.D.

SBG/cd

P.S. We now define death as "brain death". The brain & nervous system are not fully developed in the fetus; ∴ Therefore not life.

WASHINGTON
UNIVERSITY
IN ST. LOUIS

Office of the Vice Chancellor for Medical Affairs

1981 JUN 12 AM 9 14

June 10, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am replying to your May 13, 1981 inquiry concerning S. 158. As you know, this is a very controversial bill, because it attempts to legislate scientific knowledge and understanding in an area where there is much uncertainty and a good deal of disagreement. I recognize that abortion is a complicated and emotion-laden subject. Yet I do not believe it is possible to answer your questions honestly and accurately from a scientific perspective.

In general, I am of the opinion that S. 158, if enacted into law, would lead to endless uncertainty, litigation, and confusion, and would not leave our society better off than it now is with regard to this most vexing issue. It seems to me that one of the worst features of government intrusion in recent years has been the effort to legislate in areas where legislation is incapable of dealing with complex and subtle distinctions and problems. I hope that we will not once more see our government attempting to do the impossible.

Sincerely,

S.B. Guze

Samuel B. Guze, M. D.
Vice Chancellor for Medical Affairs

SBG:dlk

UNIVERSITY OF MASSACHUSETTS
AMHERST • BOSTON • WORCESTER

1981 JUN -4 AM 11:28

UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER
55 LAKE AVENUE NORTH
WORCESTER, MASSACHUSETTS 01605

Pediatric Department
(617) 856-3101

May 28, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Regarding the hearings on S.158 I would offer the following comments.

1. The question of human personhood is certainly not a medical and scientific matter alone. It is more philosophical and religious, than scientific and cannot be determined by medical data alone.

2. If S. 158 is enacted it would have an unfavorable impact on society and on efforts at genetic screening. It should be a basic right that women are not forced to bring unwanted children into the world. This is as important for the child as it is for the mother and the family.

Thus, I would strongly oppose the enactment of S. 158.

Thank you for giving me this opportunity to express my opinion on this matter.

Sincerely,

James B. Hanshaw

James B. Hanshaw, M.D.
Professor and Chairman
Department of Pediatrics

JBH:jp

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XAVIER
UNIVERSITY

Cincinnati, OH 45207
513 531-1053

HENRY J. HEIMLICH, M.D.
Professor of Advanced Clinical Sciences

1981 MAY -1 PM 2:03

April 28, 1981

Senator Max Baucus
Judiciary Subcommittee on Separation of Powers
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus:

A recent news report mentioned that hearings by the Judiciary Subcommittee on the Separation of Powers have sought to define when a "person" comes into existence. It noted that additional witnesses would be called after May 20th. I wish to offer my testimony, should it be in your power as the ranking Democrat to so recommend.

I would like to present the following scientific facts:

1) Infant mortality is the death rate calculated on deaths occurring after the delivery of a live infant. A stillbirth is, by dictionary definition, the birth of a dead fetus. A miscarriage, known by the medical term "spontaneous abortion", refers to expulsion of the fetus prior to the seventh month. These definitions are accepted by all international, federal, state, and local health agencies. In the history of collection of such statistics, I know of no doctors, statisticians, or public health agencies who have disagreed with these designations. No attempt has been made to date to have statistics on infant mortality altered to include fetuses.

2) A fetus derives its total nourishment from the mother's blood through the umbilical cord. Consequently, it is an appendage of the mother, similar to the appendix, gall bladder, or other organs. Should a mother choose to take vitamins, alcohol, drugs, or poisons, this appendage will benefit or suffer the same fate as the woman's other organs. Should the woman's blood supply to the fetus, appendix, or gall bladder be interrupted, the tissues will die and gangrene occur. It is apparent that the fetus becomes a "person" when it can survive after division of the umbilical cord, with or without external support. Prior to that, it is a part of the woman's body.

Enclosed is a summary of my background. Should you wish to obtain personal information concerning my credentials, may I suggest that you contact Senator Howard Metzenbaum.

Sincerely,

Henry J. Heimlich

Henry J. Heimlich, M.D.
HJH/ph

STANFORD UNIVERSITY MEDICAL CENTER
STANFORD, CALIFORNIA 94305 • (415) 497-5505

STANFORD UNIVERSITY SCHOOL OF MEDICINE
Department of Gynecology and Obstetrics
W. LeRoy Heinrichs, M.D., Ph.D.
Professor and Chairman

May 28, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I appreciate your request for my opinion as a medical expert about the proposed Senate Bill 158. I will respond to your questions and also give you my personal opinion.

1. Do you believe that the question of human personhood is a medical or scientific question? No, humanity or human personhood is an abstract concept describing a variety of physical, intellectual and personality characteristics or traits that we assign as the collective set that comprises that state of being (humanity). Neither medicine nor science can validate the concept. These disciplines can only verify the presence or absence of the characteristics or traits assigned.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? The "question of human personhood" is a straw man set up by those who seek to accomplish personal goals. I recognize no new scientific or medical facts that justify new inquiry into the characteristics and traits that distinguish humanity. The relevant meaning of humanity (Funk and Wagnalls Dictionary) is

   > "The state or quality of being humane: Humane denotes what may rightly be expected of mankind at its best in the treatment of sentient beings; a humane enterprise or endeavor is one that is intended to prevent or relieve suffering. The humane man will not needlessly inflict pain upon the meanest thing that lives; a merciful man is disposed to withhold or mitigate the suffering even of the guilty. The compassionate man sympathizes with and desires to relieve actual suffering, while one who is humane would forestall and prevent the suffering which he sees to be possible."

   This concept of human personhood is based upon moral, philosophical and religious precepts - it is not a political question.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

   Medical and scientific data cannot define human personhood in any context. Medical observation and scientific methodology permit classification and assessment of the expression(s) of humanity potential as it emerges during development of new life. Such data do not permit the drawing of an absolute line between the state of human personhood and lesser states of being. That line must be drawn arbitrarily, if such is necessary - my view (understanding) of biology, medicine and life is that super-human wisdom will be necessary to accomplish that feat with accuracy.

4. What, in your judgement, would be the impact if S. 158 is enacted?

   On the practice of medicine? Much human suffering will be produced, particularly among poor and ignorant young people (men and women) and their offspring. More sick babies will be produced and more babies and children will die through neglect (during pregnancy and the years of dependency) and through child abuse (physical, mental). More obstetrical, pediatric and psychiatric nursing and social service resources will be required to accommodate the suffering.

   On generic screening? This practice will cease and more defective and handicapped children will be born into distraught families.

   On the use of contraceptives? The use of intrauterine contraception will cease. The pill, condoms and diaphrams will continue to be useful, but since these are not universally applicable, the birth rate will probably rise.

   Bill S. 158 makes the bold statement that "The Congress finds that present day scientific evidence indicates a significant liklihood that actual human life exists from conception." I know of no scientific evidence for the statement which I think is patently false. I am not wise enough to be able to declare when actual human life begins but I have not known of any reports of 6, 10, 14, or 18 week human fetuses to have been able to sustain life independent of the mother, even with the ultimate effort of the medical and scientific community. Isn't an essential facet of actual human life the ability to sustain life?

I hate doing abortions which I practice as a part of comprehensive health care for women. I regard the practice as a poor choice but one with lesser consequences than the alternative evils. In a utopia, abortion would be unnecessary. Theoreticians are vulnerable to consider only the perfect world of right and wrong in absolute terms. Human experience has shades of grey which must be accommodated in our law. Humane approaches must emphasize contraception - the forestalling and prevention of the suffering through education and provision of services.

Passage of S. 158 will in my opinion, be a travesty in which the inhumanity of the propelling forces becomes evident even as they proclaim their righteousness in protecting the reputed, but arbitrarily designated humanity of a living conceptus. Goid forbid.

Sincerely,

WL Heinrichs

W. LeRoy Heinrichs, M.D., Ph.D.

WLH:cr

Boulder Abortion Clinic P.C.

1130 Alpine Avenue
Boulder, Colorado 80302
(303) 499-0480

1981 MAY -5 PM 4:33

30 April 1981

Hon. Max Baucus
United States Senate
Washington, D.C. 20510

I am deeply concerned about the Human Life Statute, S.158, which is now pending before the Senate. I am requesting your assistance in obtaining the opportunity to testify concerning the possible effects of this legislation at hearings to be held by the Subcommittee on Separation of Powers of the Senate Judiciary Committee in early June.

For your information, I am attaching a copy of my letter to Senator East and my Curriculum Vitae.

Thank you for your assistance.

Sincerely,

Warren M. Hern, M.D., M.P.H.

Warren M. Hern M.D., M.P.H.

Boulder Abortion Clinic P.C.

1130 Alpine Avenue
Boulder, Colorado 80302
(303) 499-0480

30 April 1981

Hon. John East
United States Senate
Washington, D.C. 20510

Dear Senator East:

In a conversation which I had with Mr. Craig Stern, your counsel on the Subcommittee on the Separation of Powers, I was told that I could apply to testify at hearings concerning S.158, the Human Life Statute. I would like to testify at hearings concerning the impact of this bill on the availability of abortion and women's health services to be held in early June. My testimony will address the following topics:

Public health aspects of abortion safety and the effect of S.158 on the provision of safe abortion services.

The projected public health consequences of the criminalization of abortion.

The effect of this legislation on the provision of contraceptive devices and drugs that control fertility such as diethylstilbesterol.

The effect of this legislation on the treatment of conceptions resulting in hydatidiform mole, chorioadenoma destruens, and choriocarcinoma.

The effect of this legislation on the treatment of ectopic pregnancy.

The effect of this legislation on the mental health of women who request abortion but are unable to obtain it.

The effect of this legislation on the physical health of women who request abortion but are unable to obtain it.

The effect of this legislation on the provision of health care for women who are in the reproductive age range but who are not thought to be pregnant.

My curriculum vitae is attached.

Sincerely,

Warren M. Hern M.D., M.P.H.

Statement of Warren M. Hern, M.D., M.P.H.
submitted in testimony concerning S. 158
to the U.S. Subcommittee on Separation of
Powers, Committee on the Judiciary, 97th
Congress, 20 May 1981

Warren M. Hern, M.D., M.P.H.
Director
Boulder Abortion Clinic, P.C.
1130 Alpine
Boulder, Colorado 80302
(303) 447-1361

Senate Bill 158 seeks to impose a view of human existence on our society which is appealing in its apparent simplicity: human life begins at conception. On examination, however, this question proves to be more complex. Even the idea that human life begins at the moment of conception is subject to interpretation. Does conception mean "fertilization" or "implantation"? Which conception? Could it have been the one (which one?) that occurred three million years ago near Olduvai Gorge in Africa?

The view of a theoretical instant in which each individual comes into being is in conflict with the view of life as a continuous stream reaching back into the origins of life itself hundreds of millions of years ago. It is in conflict with the demonstrable fact that each sperm and ovum is a human cell; that each diploid cell in the rest of the body has 46 chromosomes; and that, while the cells in each of our bodies are constantly dying and being replaced, our structures remain. If each single fertilized ovum is a "person", impossible to see without a microscope or even to define easily the moment it begins to exist, why is it not true that each of the billions of cells in each of our bodies is a "person"? Do we not abuse some millions of these "persons" each time we inhale smoke from a cigarette, sustain an injury during voluntary athletic activity, or drink an alcoholic beverage? In the latter case, millions of liver cells may meet an ignominous death with each martini.

The idea that each fertilized ovum is a person is about the same thing as saying that each set of house plans is a house. Calling an ovum a person does not make it so. Calling a fetus an unborn person (and perhaps baptizing it) is as illogical as burying an undead body. This ruse perpetuates an illusion that is useful to someone, but in the case of S.158, the consequences to others may be catastrophic.

Since the bill in question is aimed at making abortion illegal, it is worthwhile to examine some of the health and social consequences that such an action would have.

In this context, it is apparent that the focus of the discussion is misplaced. The fetus has become a chimera: an imaginary godlet to be pursued, glorified, and sanctified while its passive vessel, the woman, is reduced to the status of a mere reproductive machine serving the needs of the state. The focus is not properly the fetus, but pregnancy and its effect on women's health. If pregnancies did not occur, we would not be having this argument. If unwanted, unplanned pregnancies did not occur, we would not be having this argument. If amateur abortions and pregnancy itself did not kill women, we would not be having this argument.

In 1920, the maternal mortality rate in the United States was 680 per 100,000 live births.[1] By 1960, the maternal mortality was around 38 per 100,000 live births. This reduction was brought about by a number of things: better prenatal care, better obstetrical care, the introduction of blood transfusion, antibiotics, and other drugs; longer birth intervals, postponed first births, fewer total pregnancies per woman, and better nutrition. Nearly half of all maternal deaths in both 1920 and 1960, however, were due to induced abortion in some areas of the country. In New York City, as late as 1965, 55% and 65% of maternal mortality among black and Puerto Rican women, respectively, was due to septic abortion.[2]

Since 1970, however, abortion has become the safest surgical procedure - and the most heavily monitored - in the United States. The number of abortion deaths dropped from an average of 250 in the mid-1960's to less than ten per year currently, whereas more than twice as many abortions are now being performed.[3] A barrier contraceptive method backed up by early abortion is now the safest fertility control method available to women,[4] and early abortion is now the safest of all possible outcomes for pregnant teenagers.[5]

This improved safety is almost entirely due to the legalization of abortion, first in several states, then nationally, which permitted the introduction of improved techniques and the accumulation of skills and experience by physicians performing abortions. The risk of death due to early abortion is now less than one per million procedures. Overall, the risk of death due to abortion is currently less than one per 100,000 procedures, whereas the risk of death due to term birth is approximately 14 per 100,000 live births.[6] The risk of major complications in abortion is 1/200th the risk a woman experiences in term birth.[7] If she has a Cesarean section for delivery, her risks are magnified many times.[8]

It is important to understand that these risks are experienced by all women who are pregnant whether they wish to be pregnant or not.

From a medical point of view, abortion should be the indicated treatment for pregnancy unless a woman has a desire to carry the pregnancy to term and reproduce.[9]

The effort to criminalize abortion through the mechanism of according the fetus the status of personhood, however, would have serious public health consequences not envisioned by its proponents. If interpreted literally by a zealous prosecutor, S.158 would have the following consequences:

- * It would proscribe all abortions.
- * It would criminalize the use of intrauterine devices.
- * It would prevent the use of certain oral contraceptives and drugs such as diethylstilbesterol used in preventing pregnancy following unprotected intercourse, as in rape.
- * It would prevent treatment, emergency or otherwise, of hydatidiform mole, chorioadenoma destruens, choriocarcinoma, and unruptured ectopic pregnancy. The first three, including the third which is a cancer, arise from conception to become an undifferentiated mass of cells or water sacs, would be classified as "persons" under the law.
- * It would prevent the treatment of women for conditions unrelated to pregnancy without absolute proof of non-pregnancy, which is impossible under most circumstances.

- It would result in the prosecution of women experiencing spontaneous abortions for negligent homicide if evidence could be found that the woman engaged in any physical activity or substance use that might lead to spontaneous abortion.[9a]
- It would prohibit the use of amniocentesis for the diagnosis of genetic defects.
- It would probably interrupt current research on *in vitro* fertilization (test-tube babies) for the benefit of infertile couples.
- It would prohibit evaluation of infertility in women since non-pregnancy would have to be proved before tests could be performed.
- It would prevent the use of X-rays on women who had suffered trauma and who were currently pregnant or might be.
- It would disrupt a confidential doctor-patient relationship in all cases of women in the reproductive age range.
- It would increase the number of unplanned pregnancies due to the criminalization of both effective contraceptives and abortion.
- It would result in a catastrophic increase in the number of deaths and life-threatening complications due to improperly performed abortions.

As the result of criminalization, the number of abortions performed would probably drop to no less than half the 1.5 million currently being performed.[10] An unknown number would be added to this fraction as the result of an increase in the number of unplanned pregnancies due to the criminalization of contraceptive methods.

Some illegal abortions would be performed openly by physicians in defiance of the law; some would be performed surreptitiously by physicians; many would be performed surreptitiously by non-physicians. A significant portion of the latter category would be performed under unhygienic conditions by unskilled persons leading to serious complications and death. Since clandestine illegal activities are vulnerable to organized crime, underworld control of abortion activities would be likely.

Women who experience "high risk" pregnancies - teenagers, older women, women who have recently delivered or who have had many pregnancies - would be forced to carry pregnancies to term whereas they are likely to choose abortion under the current circumstances for their own reasons. The result will be an increase in maternal mortality and complications due to pregnancy, increases in infant mortality, percentage of low birth weight infants, percentage of premature births, an increase in the proportion of developmental and functional abnormalities, an increase in the number of birth defects, and a higher neonatal mortality rate. Since many women who are on welfare fall in the "high risk" category, a considerable portion of the expense in treating these complications will be billed to the public treasury. The decision to implement this form of social injustice, however, has already been codified in the Hyde Amendment.

One-third of all abortions currently are performed on teenagers. Most of these young women are unprepared for the emotional, intellectual, social, and economic responsibilities of parenthood in a complex society and are unprepared to form stable families with their partners. The argument that they should be forced to continue unplanned pregnancies in order to increase the supply of adoptable babies is both cruel and delusional. Over 90% of teenagers who continue unplanned pregnancies to term do not give up their babies for adoption. Worse, this attitude assumes that it is appropriate to force young healthy white women to become reproductive machines for the infertile members of the white middle class.

Spontaneous abortion occurs in as many as 50% of all conceptions; about one-third are clinically apparent. That is to say, the woman knows she is having a miscarriage. Will legislators distinguish between spontaneous abortions that are products of naturally-occurring processes such as a "blighted ovum" and those which might result from activities "injurious" to the embryo? Who will define what activities are "injurious" and might lead to prosecution for negligent homicide?

What is the role of the physician in treating a woman who appears to be having the early symptoms of miscarriage? What medical treatment will be legal? In many ways, passage of S.158 into law will seriously hamper the application of current medical knowledge in the treatment of women for a wide variety of illness conditions.

One problem is that Western society treats pregnancy as an illness but doesn't admit that pregnancy is in fact an illness condition.[11] Women frequently know better. In nearly all human societies, they seek medical care for pregnancy, in the terms available in their own culture, whether the pregnancy is desired or not.[12,13] In most societies throughout human experience, various fertility control measures have been used, including abortion.[14] Laws have never prevented abortion, and they never will.

In fact, the control of population growth through the control of fertility has been studied by anthropologists as an adaptive response to resource scarcity and population pressure.[15] There is no doubt that many in our society perceive a scarcity of resources at this time. The present government of the United States, in fact, is devoting considerable attention to this fact. People are not likely to respond to the message of economic scarcity by giving up known fertility control methods simply because a religious minority wishes them to do so for reasons of "morality". It is a double message: times are hard; be fruitful and multiply, but you're on your own. People will act in their own self interest under these circumstances and control their fertility despite exhortations (and laws) to the contrary.

S.158 appears to be a response of a conservative minority to the relentless social change of the last twenty years. This social change has been fueled to a considerable degree by the introduction of highly effective, safe fertility control measures which are available on a wide scale for the first time in human history. From the point of view of cultural change, it is probably the equivalent in importance to the domestication of fire at the human hearth.

An important consequence of this new availability of fertility control is the enhancement of the status and independence of women, which has been increasing over the past 50 years. The new role of women, however, collides head-on with the view that pregnancy is normal, and that the principal function of women is to bear children. This view is no longer shared by a great many people, and it is no longer adaptive in terms of individual or species survival.

The view that pregnancy is normal is not adaptive from an individual woman's point of view since the need for medical attention to assure survival of a term pregnancy is a demonstrable fact.[16] The view that pregnancy and therefore uncontrolled fertility is normal is no longer adaptive from the point of view of species survival. In fact, the explosion of the human population threatens not only our own survival, but the survival of every other species on the planet. The cultural view that pregnancy is normal, therefore, was adaptive when humans were scarce and mortality high, but it is now maladaptive. It is, in fact, outright dangerous for the average woman.[17]

Fortunately, the safe and effective fertility control measures which are now available, though not always 100% effective, make it possible to have another view of pregnancy.

If pregnancy is viewed as it really is, an illness condition requiring medical and/or surgical treatment, the question becomes: what is the appropriate treatment for this particular pregnancy?[18] It may be abortion, prenatal care, medical management, Cesarean section, supportive psychotherapy, or some combination thereof. The appropriate treatment depends not only on the woman's physical condition but her attitude toward the pregnancy. The detrimental effects of forcing a woman to carry a pregnancy to term when she does not wish to do so have been clearly demonstrated in numerous studies.[19,20] The point is that women need the best medical care and social support they can get during pregnancy regardless of the type of treatment they deem appropriate for themselves.

Whether or not this view of pregnancy is accepted or disparaged by legislator or doctor, the response of women in our own society as well as in others indicates that women will find ways to obtain abortions even if they will be under criminal penalties and the risk of death for doing so.

The technology of abortion is so widely available[21-29] among physicians and non-physicians alike that enforcement would be hopeless, so what is the point of this exercise? Are we willing to have a police state and keep all women under constant surveillance to ensure the law is observed? Or will we simply put doctors in jail for performing abortions, leaving transgressions to the untutored? Putting a few doctors in jail would be a dramatic symbolic gesture fulfilling someone's political purposes, but it would not meet the objectives of the law.

If there are exceptions to this law permitting abortions of some kind, then it is an admission that some forms of "human" life are less desireable than others; it is acceptable to kill some. If that is the case, then the question becomes: what is the most reasonable and widely accepted public policy concerning the killing of human beings? If our focus shifts from the alleged sanctity of the fetus to the choice of rational public policy, what is the point of passing a more controversial, irrational law before we begin to agree on a policy?

If there are no exceptions, then there can be no capital punishment, either. It would mean, however, that we will be ready to imprison as many women as we can find having abortions and we will imprison doctors and others who help them.

The underlying logic of the latter argument is that society must be protected against individuals (doctors who perform abortions; women who want them) in order to protect the embryos. Could it be that there is a scarce supply of human embryos? Could it be that we need a pronatalist public policy because of the shortage of people? Hardly.

One problem, frankly, is that some doctors argue a lot and don't go along with all the conventional views. The other problem, and most important, is that women are uppity, they vote, and they are competing with men for jobs and power. Fetuses, on the other hand, are apolitical, don't argue, present no economic threat, and may be defended along with the flag and motherhood before the voters at election time. They can be defended against sin and immorality. Best of all, they may be spoken for by those with political power without fear of contradiction.

One of the things about this debate that really bothers me is that while I have never asked for a woman to be imprisoned for not wanting to have an abortion, nor have I asked for any doctors to be imprisoned for not wanting to perform one, I clearly risk imprisonment along with my patients if this bill becomes law. That is so because I now include in my definition of personal and political liberty the freedom to provide safe abortion services for women who want them.

This dilemma brings us clearly to an understanding of the struggle before us. The issue is not the protection of human life. We are already doing that by providing safe abortions for women. The real issue posed by S.158 is the definition of power: who has it and who doesn't. The issue is whether power in America will be wielded absolutely by those who cannot get pregnant, or whether it will be shared by those who can.

Under S.158, the individual control of female fertility is to become a political crime against the state. It directly challenges the state's asserted power to determine individual reproductive decisions. In fact, the view that the state may change its laws to influence fertility is found in Roe v. Wade and other recent court decisions. It is most sharply drawn in the current statute, the Fetal Supremacy Bill. It says that fetuses are more important than adult women, and that the place of women is home having babies. Hunting and gathering tribes in the jungles of South America are more progressive than the society reflected in this legislation.

Maybe the amendment to the Constitution which we really need is one that protects the right of reproductive choice.

The question before our society is not when life begins, but who is best prepared to decide when to transmit life to a new generation - the individual or the state? I have no hesitation in supporting the right of the individual woman to make this choice. In this matter, she is more competent than any government.

The right of reproductive choice is this generation's beachhead of freedom. We will not give it up.

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1981 JUN 11 AM 9 39

June 8, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I appreciate your letter requesting my evaluation of S. 158. My evaluation and comments are as follows:

1) I do not believe that the question of human personhood is a medical or scientific question.

2) I feel that human personhood is in part a moral, ethical, philosophical, religious and is becoming a political question.

3) The impact of S. 158, if enacted, would be far reaching. It would prevent genetic screening and if the law was obeyed in its strictest sense, then would prohibit the use of contraceptives.

S. 158 does not address the issue of induced abortions, and if the issue is to prohibit abortion, the legislation should address that issue and not approach it through this circuitous route. If enacted, S. 158 would create a class of persons coexisting in the body of another person from conception, and thus would raise unsolvable problems in the health care of women.

Sincerely yours,

Lawrence L. Hester, Jr.

Lawrence L. Hester, Jr., M. D.
Professor and Chairman

LLH/bat

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Kurt Hirschhorn, M.D.
Herbert H. Lehman Professor of Pediatrics
Chairman, Department of Pediatrics

April 20, 1981

Mr. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Mr. Baucus:

I am writing you with reference to your questions of April 16, 1981.

I am fully convinced that the question of human personhood, as you call it, is a personal philosophical matter as is the general problem of abortion. I fully respect the opinions and actions of both those who are opposed to abortion as well as those who feel that the woman should control her own body in all matters. While medical and scientific data can define life even of a single cell, the question of human life and its time of onset is again a matter of personal opinion. My own view, purely personal, is that human life begins at birth.

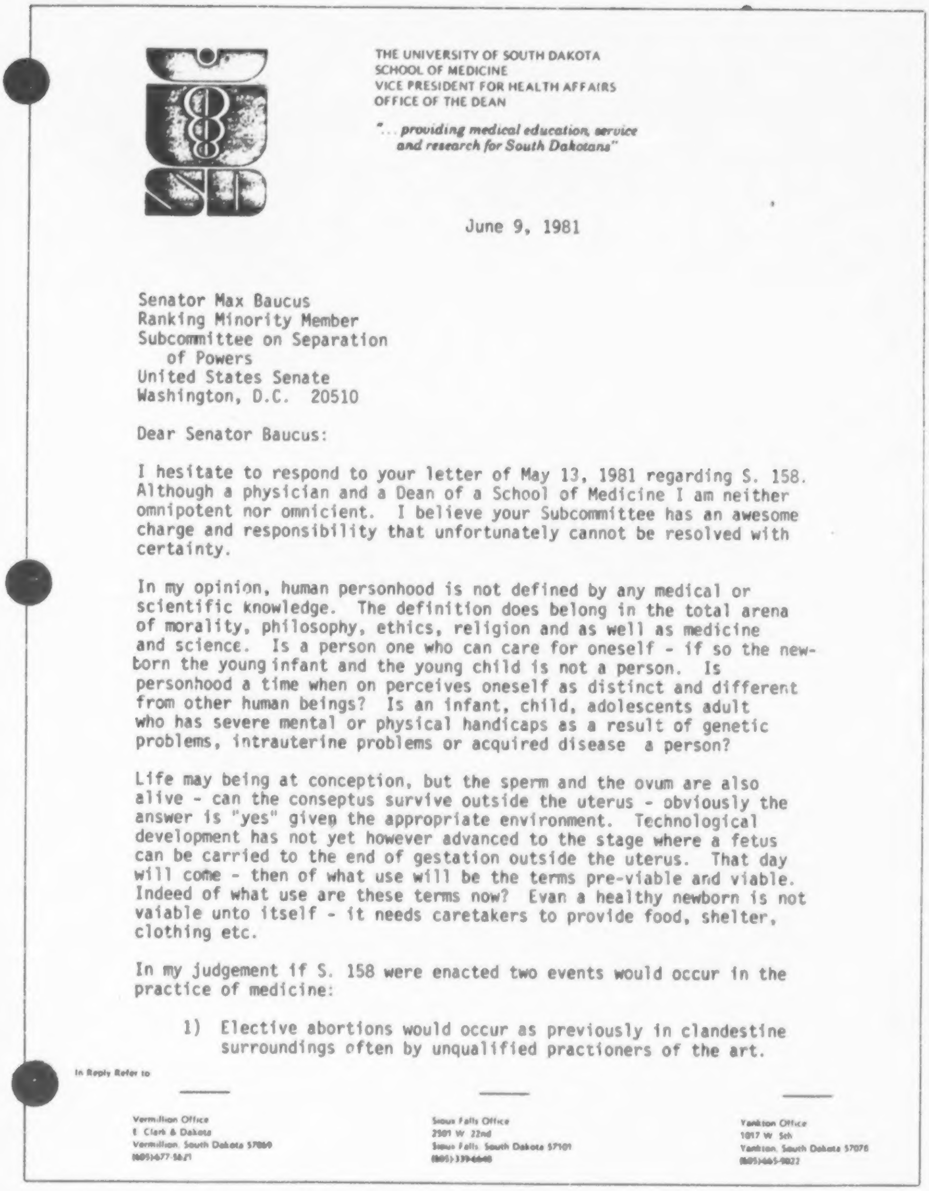
As a geneticist my major concern with the bill is that it would remove a life giving and life saving procedure from our armamentarium, that of prenatal diagnosis of genetic disease. This technique currently helps many thousands of couples every year to start pregnancies at risk which they would not have started and stops many others from aborting such pregnancies at risk since the majority of these tests produce normal results. It is however only the possibility of aborting a fetus found to be grossly abnormal that allows such couples this option.

Sincerely yours,

Kurt Hirschhorn

Kurt Hirschhorn, M.D.
Professor and Chairman
Department of Pediatrics

KH:erb



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June 9, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I hesitate to respond to your letter of May 13, 1981 regarding S. 158. Although a physician and a Dean of a School of Medicine I am neither omnipotent nor omnicient. I believe your Subcommittee has an awesome charge and responsibility that unfortunately cannot be resolved with certainty.

In my opinion, human personhood is not defined by any medical or scientific knowledge. The definition does belong in the total arena of morality, philosophy, ethics, religion and as well as medicine and science. Is a person one who can care for oneself - if so the newborn the young infant and the young child is not a person. Is personhood a time when on perceives oneself as distinct and different from other human beings? Is an infant, child, adolescents adult who has severe mental or physical handicaps as a result of genetic problems, intrauterine problems or acquired disease a person?

Life may being at conception, but the sperm and the ovum are also alive - can the conseptus survive outside the uterus - obviously the answer is "yes" given the appropriate environment. Technological development has not yet however advanced to the stage where a fetus can be carried to the end of gestation outside the uterus. That day will come - then of what use will be the terms pre-viable and viable. Indeed of what use are these terms now? Evan a healthy newborn is not vaiable unto itself - it needs caretakers to provide food, shelter, clothing etc.

In my judgement if S. 158 were enacted two events would occur in the practice of medicine:

1) Elective abortions would occur as previously in clandestine surroundings often by unqualified practioners of the art.

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EQUAL OPPORTUNITY–AFFIRMATIVE ACTION EMPLOYER

Senator Max Baucus
Page 2
June 9, 1981

2.) Malpractice suits against obstetricians would increase logarithmically.

Today the obstetrician must tell a women of age 30-35 or greater that she runs a risk of having a child with Down's syndrome. The obstetrician must offer to perform an amniocentesis - if he/she does not and a Down's Syndrome occurs, the physician is liable for malpractice. Todays couples have limited the number of children they desire - as a consequence they expect perfect, healthy, newborns. Genetic screening amniocentesis and counseling would have to be deemed illegal procedures.

In regard to contraception, certainly the "morning after pill" and the IUD would become illegal.

Certainly the potential for human life begins at conception - however the question is - does this constitute a person?

I do not belong to either a pro-life or pro-abortion group, nor does my religious affiliation encourage support of either of these two groups. In my experience individulization of whether to consider abortion has been satisfactory to all parties.

My response has not been erudite nor profound. I can offer no wisdom in solving the question. I doubt that this reply is helpful to you, but I decided to send it because of 1.) Respect for your position and the Congress and 2.) Perhaps it along with other replies you may receive will reinforce the fact that this is a complex issue that requires careful and prolonged deliberation.

Respectfully submitted,

Charles E. Hollerman, M.D.

Charles E. Hollerman, M.D.
Vice President for Health
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CEH/ceg

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June 5, 1981

Mr. Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Re: Hearings on S. 158

Dear Mr. Baucus:

In your letter of April 16, 1981 you asked for my opinion about the question of defining human personhood. Since I received this letter, I have followed the hearings with interest. I have been disappointed to see that there is a marked bias in the viewpoints of the persons being allowed to testify. However, my point of view is similar to that of Drs. Mary Ellen Avery of Harvard and Leon Rosenberg of Yale who have testified.

From my experience in both laboratory studies of embryos and clinical studies, there is no scientific data that can determine when human personhood is present during development. This is clearly a matter of personal opinion.

In my work I meet many couples whose infants have serious and handicapping or fatal birth defects. Without the availability of prenatal diagnosis in future pregnancies, these couples often would be unwilling tc undertake additional pregnancies. Most of the time the studies provide the reassurance these parents need. Being deprived of access to prenatal diagnosis by amniocentesis would be cruel and arbitrary. We cannot turn the clock back on medical technology, no matter how much Senator Helms may wish to. If given a choice, I do not believe most Americans want to give up the option of prenatal diagnosis for the identification of birth defects.

I would be happy to be of assistance to you and your staff in any way that I can.

Sincerely yours,

Lewis B. Holmes
Lewis B. Holmes, M.D.
Chief, Embryology-Teratology Unit

Associate Professor of Pediatrics
Harvard Medical School

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1 June 1981

The Honorable Max Baucus
Subcommite on Separation of Powers
Senate Office Building
Washington, D.C. 20510

My dear Honorable Baucus:

I am pleased to write to you concerning the very important Senate Bill 158 which provides that human life shall be deemed to exist from conception.

There is no scientific evidence whatever that bears on the question of whether or not human personhood begins at conception. This is a moral, ethical, philosophical, and religious question that in our country will, and must, require a multitude of answers.

It is absolutely clear that medical and scientific data alone cannot determine the definition of human personhood.

The issue before the Senate at the current time on the beginning of personhood is obviously focused on the question of abortion. The advent of prenatal diagnosis and the detection of severe lethal and tragic genetic defects which can now be detected *in utero* permit families to have normal children who otherwise could not do so. It is unthinkable to me that anyone could force their religious viewpoints on others and require that they bring into the world a tragically genetically damaged child whose life is guaranteed to be short and filled with agony and suffering.

The issues at hand require that there be a large number of answers. Each person, as originally supported in the Supreme Court decision of *Roe vs. Wade*, must make these decisions for himself or herself.

Recent data from a large program in Australia by Dr. Byron Kakulas has demonstrated clearly a substantial reduction in the incidence of muscular dystrophy through the use of prenatal diagnosis. These important genetic tools must not be denied those who feel them appropriate.

Very best regards.

Sincerely,

R. Rodney Howell, M.D.

RRH/sm

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1981 JUN 14 AM 10: 32

June 9, 1981

The Honorable Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

I acknowledge with thanks the receipt of your communication of May 13, 1981 relevant to the hearings of your subcommittee on S.158.

You may be interested to know that I have served as an expert medical witness at court hearings, relevant to recent changes of abortion laws, in four states of the Union. Although I don't hold myself out as an "anti-abortionist," on account of the medical opinion that I hold in this matter, my testimony was invited by the groups who sought changes in the liberal abortion laws that had been introduced in this country some ten years ago. Throughout these hearings I maintained the view that medical men have no special expertise in theological and philosophical matters and based my testimony on scientific observations made by others as well as myself. It is on the same ground that I will attempt to answer your questions in the same order as you presented them:

1) I am inclined to agree that in the final analysis the question of human personhood will be a medical and scientific subject. However, I do not think that at the time of this writing the question can be answered on the basis of available scientific evidence.

2) Whereas I do agree that the question of human personhood relates to moral, ethical, philosophical, religious, and political concepts, this belief of mine derives from my general thinking as a human being and does not rest on any particular evidence that derived from my scientific activities.

3) As indicated above, I do not believe that current medical and scientific data permit the definition of human personhood at present.

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4) I feel that the answer to this question should rest with legislators and lawyers whose experience for such prediction is probably superior to that of physicians.

Hoping that you will find my answers helpful I am

Sincerely yours,

Leslie Iffy

Leslie Iffy, M.D.
Professor of Obstetrics
and Gynecology

Director, Division of
Maternal-Fetal Medicine

LI/t

Ken -
S.158

1981 AUG 20 AM 7:10

August 18, 1981

Dear Senator Baucus:

We are sending to you and the other members of the Senate Judiciary Committee, a statement from 84 scientists working in the fields of fertilization and embryology, concerning the issue of defining the beginning of human life. We hope that you will take this statement under serious consideration, and that it will be of use to you in your deliberations.

Yours sincerely,

Laurinda A. Jaffe

Laurinda A. Jaffe
Assistant Professor of
Physiology
Univ. of Connecticut
Health Center
Farmington, Conn. 06032

It is the view of the undersigned scientists working in the fields of fertilization and embryology that science cannot define the moment at which "human life" begins. Present day science views life as a continuum; fertilization or "conception" does not initiate life. Congress is trying to define when in this continuum, a "human soul" enters the cellular components and initiates a new "human life". On this issue, we agree with the statement made on April 28, 1981, by the National Academy of Sciences, that "defining the time at which the developing embryo becomes a 'person' must remain a matter of moral or religious values". We believe that such a decision should remain up to the individual and should not be legislated. Consequently, we oppose H.R. 900, S. 158, and any bill or constitutional amendment which attempts to define when human life begins.

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NORTH SHORE
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Department of Pediatrics
Child Development Center of NSUH
Center for Handicapped Children
Cytogenetics and Biochemical Genetics Laboratories
Developmental Disabilities Service
Genetic Counselling Program
March of Dimes Birth Defects Center
Nassau Cleft Palate Center of NSUH

(516) 562-4610

May 28, 1981

Senator Max Baucus
1107 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus:

We are writing to you regarding our views on the proposed Helms-Hyde bill (S158). Our written testimony accompanies this letter.

Apropos the above, we believe a visit to our Center would be informative to you and your staff, and we would welcome such a visit.

Sincerely,

Ghazela Javaid
Ghazela Javaid, M.D.
Child Psychiatrist

Meryl Goldberg
Meryl Goldberg, C.S.W.
Social Worker

Patsy Hirschhorn
Patsy Hirschhorn, A.C.S.W.
Senior Social Worker

PH:mm
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Testimony Regarding S158

We are concerned about the possible elimination of official approval of amniocentesis as a diagnostic tool for the prevention of certain birth defects in children, i.e. Down Syndrome and other chromosomal anomalies, neural tube defects, Tay Sachs disease, Muscular Dystrophy, Sickle Cell disease, and many others. Patients at risk for any of the above conditions can be offered amniocentesis.

Amniocentesis is a proven safe prenatal test performed at the 16th to 18th week of pregnancy in approved medical settings. It gives the physician information regarding the developing fetus, which is then communicated to the patient. If the fetus is affected by retardation, handicap, or lethal condition, the patient may then have an option to either abort the affected fetus or continue the pregnancy, being aware of the outcome. In our experience with a diverse population, from urban, suburban and rural areas, multi-ethnic and religious groups, from all socioeconomic strata, only a negligible number of families have opted to continue their pregnancies after the negative results of the amniocentesis were made available to them.

As well as providing genetic counseling and prenatal testing, our Center also provides on-going diagnostics and treatment for children with birth defects and genetic disorders. Families of these children are faced with the lifelong burden of caring for individuals with limited capabilities and for whom society has very little tolerance and offers minimal supports. These families are faced with increased longterm needs for specialized medical help. They need special education and therapies and possibly multiple hospitalizations for the child. Without adequate community support systems or even willing babysitters, feeling trapped, the needs for these families for counseling and psychiatric help increase. The normal siblings in such families also suffer the effects of this continuous psychological, physical, and financial drain. The families themselves feel stigmatized and isolated. The process of mourning for the expected normal child that never was is lifelong.

We strongly feel that every individual has the right to benefit from the advances that medical science has made. We have learned that, contrary to Senator East's view that a "cavaliere" attitude exists regarding termination of pregnancy, each family struggles painfully with the decision to abort a defective fetus. We are repeatedly asked if a mistake was made in findings, if the test can be repeated, if treatment or corrective procedures can be done. Unfortunately, we must answer negatively to the above.

We find unconscionable the current proposal that any family should be sentenced to live with the burden we have summarized here so briefly. The committee should be aware that the burden extends beyond the family to the government, which must be prepared to provide an increasing base of community services if birth defects are no longer allowed to be prevented.

Ghazela Javaid
Ghazela Javaid, M.D.
Child Psychiatrist

Patsy Hirschhorn
Patsy Hirschhorn, A.C.S.W.
Senior Social Worker
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Meryl Goldberg
Meryl Goldberg, C.S.W.
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UNIVERSITY OF MISSOURI-KANSAS CITY

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June 24, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

I am responding to your letter of May 13, 1981, concerning legislation before the United States Senate Judiciary Committee Subcommittee on Separation of Powers which is known as S. 158.

I very much appreciate your willingness to seek my position on this legislation as a medical expert. I do apologize for not responding to you prior to June 12 as you requested, but I have been out of the country. I certainly think that I qualify to offer an opinion on this legislation as a medical expert. My undergraduate degree is in Biology and subsequently I received the Doctor of Medicine degree. My postgraduate training was in the field of obstetrics and gynecology and I spent 17 years in the private practice of that specialty.

During my private practice years I took care of countless patients who had spontaneous abortion due to blighted eggs, genetic deformity incompatible with life and unwanted pregnancy due to rape and incest. The immedicate ramifications of passage of legislation such as S. 158 which would confer personhood even on a blighted egg which cannot develop normally would create an environment in which the advances of medical science which have helped women effectively understand and make the appropriate decision would be prohibited under such legislation. The issue which must be considered here should not center on the debate over when and where life exists. Life exists in inanimate objects. Life exists in a sperm. Life exists in an unfertilized egg. The issue here evolves around the question of at what point in the development of a fertilized egg should the full rights of personhood be conferred.

In answer to your specific questions:

1. I do not believe that the question of human personhood is a medical and scientific question.

The Honorable Max Baucus
June 24, 1981
Page Two

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2. Defining human personhood becomes a moral, ethical, philosophical or religious question which should be outside the framework of our traditional American political process.

3. Medical and scientific data cannot determine what the definition of personhood should be.

4. The impact, if S. 158 should be enacted, would have profoundly serious and dangerous effects in a variety of areas. It would create monumental legal problems. It would destroy the traditional relationship between doctor and patient. It would negate scientific advances in the area of improving the quality of life.

For your information I would refer you to the position of the American College of Obstetricians and Gynecologists consisting of 20,000 physicians treating women in the United States. The Executive Board of the College has unanimously approved an official statement of policy opposing S. 158 and similar types of legislation. I am enclosing a copy of that official statement of policy and am certainly in full concurrence with this position, as are the vast majority of obstetricians and gynecologists in the United States.

There are two basic College viewpoints (among all the issues) concerning this legislation:

1. The legislation does not address the issue of induced abortion. Rather, it attempts to extend personhood and constitutional rights to a whole new class of beings. If the issue is prohibition of abortion, the legislation should address that issue.

2. By creating a class of persons co-existing in the body of another person, the legislation raises unsolvable problems--medical, legal, ethical and social--in the health care of women. Many of these problems could indeed abrogate the right of the pregnant woman to her own life (as in spontaneous abortion, ectopic pregnancy, choriocarcinoma) or of all women to access to contraceptive methods.

The Honorable Max Baucus
June 24, 1981
Page Three

I strongly urge, therefore, that as a ranking minority member of the Senate Judiciary Committee Subcommittee on Separation of Powers you stand in opposition to such legislation. President Reagan campaigned strongly and clearly for efforts to get the federal government off the backs and out of the lives of people of the United States. Why, therefore, should the majority of the Congress appear to be moving in the opposite direction by enacting legislation which places governmental restriction on freedom of choice?

I would be interested in learning more of your position on this issue. Thank you for giving me the opportunity to comment.

Sincerely yours,

Harry S. Jonas, M.D.

Harry S. Jonas, M.D.
Dean

HSJ/rlm

Enclosure

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603 MEDICAL TOWER
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TELEPHONE (804) 628-337

1981 APR 27 AM 9 2

April 20, 1981

Senator Max Baucus
United States Senate
Washington, D. C. 20510

My dear Senator Baucus:

I wish to acknowledge your letter of April 16, 1981 and am pleased to give my views as to whether or not human personhood is a medical and scientific question.

This problem has been debated and discussed through the ages. It has often been referred to as ensoulment. Leaving aside the difficult scientific question of the identification of the moment of conception, it must be noted that ensoulment, or personhood, is an unprovable concept and therefore a belief, or an opinion. It is not a fact determinable or demonstrable by scientific analysis but a concept of philosophical origin. Religious scholars have spent much time attempting to resolve this question and have arrived at divergent opinions. For example, there are those who believe that ensoulment occurs at implantation, that is, when the embryo attaches itself to the uterus; or at quickening, that is, when the embryo is felt to move; or not until viability, that is, when the embryo is able to survive outside the womb on its own. Because the correct choice among these options is clearly unidentifiable by man and because no one knows the will of the Creator better than anyone else, it may be held that freedom of choice is the essential ingredient to the solution of this philosophical religious dilemma. To hold otherwise would require the imposition of a philosophical or religious belief of one group upon another.

Life does not begin or end in any individual. The sperm and egg are very much alive. LIFE is a continuum. Sperm and egg are passed on. LIFE is a relay in which the individual is the baton which is held but for a fleeting moment. It is the baton, the individual, the person, with whom we are concerned, not cells. In my view, it is not to understand to equate the person with an embryo of a few cells. This is so, for no other reason than such an embryo can dispense with one or more cells probably half or even more in the few cell stage and the remaining cells will develop into a normal person. Furthermore, the union of the sperm and egg by no means guarantees that a person will develop eventually. A union of a sperm and egg can result in a hydatidform mole which is a tumor. Thus, ensoulment, or personhood, or the development of the individual is a much later event and not determinable by scientific means. The baton is always passed to the relay runner after recipient has started and is running as fast as he can. LIFE is a continuum.

With best wishes, I am

Sincerely yours,

Howard W. Jones, Jr., M. D.

HWJjr/nwg

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Medical Center
Morgantown West Virginia
26506

West Virginia
University

June 2, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am responding to your letter of May 13, 1981, and the four questions relating to human personhood. I have discussed your letter with our Educational Advisory Council, a group of Departmental Chairpersons from both our Clinical and Basic Science Departments. The responses to your specific questions are, therefore, a reflection of our collective opinion.

Our response to your questions is as follows:

(1) Do you believe that the question of human personhood is a medical and scientific question?

We do not believe that the question of human personhood is a medical and scientific question.

(2) Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

We believe that the question of human personhood is totally a moral, ethical, philosophical and religious question. We are unanimous in recommending against it becoming a political question.

(3) Do you believe that the medical and scientific data alone can determine what the definition of human personhood should be in the present context?

We do not believe that the medical and scientific data alone can determine the definition of human personhood.

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(4) What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

We believe that the practice of medicine, genetic screening, and the use of contraceptives would be distinctly affected if S. 158 is enacted. We believe that the potential impacts are sufficiently covered in the enclosed articles ("Senate Commences Hearings on 'Human Life'," Science, Vol. 212, May 8, 1981, pp. 648-649, and "Academy Protests Human Life Bill and Budget Cuts," Science, Vol. 212, May 15, 1981, p. 760.)

Sincerely yours,

John E. Jones, M.D.
Dean, School of Medicine

JEJ/cm

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1981 APR 27 AM 10 19

April 23, 1981

Senator Max Baucus
United States Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus,

Thank you for your letter of April 16th concerning hearings on S. 158. Although I do not consider myself an expert in the philosophical reaches of questions opened by the Bill, I have had long and varied exposure to the problems created by abortion. I will try to answer your three questions to the best of my judgment.

If we could reach a definition of personhood, which I doubt, your questions might be easier to answer. Whatever the definition, however, I do not believe that there is any medical or scientific information that can shed any precise light on the subject of personhood. I believe that the question of "What is a person?" is a legal one and has so been considered by the Supreme Court of this country and in most countries of the world.

I believe that the above opinion answers the three direct questions which you asked. It does not, however, answer the implied question of "When does human life begin?". I believe that the terms "life" and "person" are not the same. I do not believe that recent scientific advances have shed any more light on the question of when life begins than when it was considered by the Supreme Court in Roe-vs.-Wade. At that time the Supreme Court quoted my textbook Williams Obstetrics as a reference for the position that in view of lack of scientific data on this matter, the Court did not feel competent to make any decision. I personally doubt that there will ever be scientific data that will fix the precise moment when life begins.

Finally, I find difficulty with S. 158 in that it treats the terms "life" and "person" as one in the same and uses these terms interchangeably. As I indicated previously, these terms are not identical and are not subject to scientific discovery.

Please let me know if I can be of any further help in this very serious matter.

Sincerely,

L M Hellman

Louis M. Hellman, M.D.
Professor Emeritus, Obstetrics and Gynecology, State University of New York
Former Deputy Assistant Secretary, Population Affairs, and Administrator of HSA, HEW

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ARTHUR L. HERBST, M.D.
Chairman and
Joseph Bolivar DeLee Professor

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13th and I am pleased to have the opportunity to respond to your questions about S 158 and human personhood.

I recognize that there has been and will continue to be extensive discussions on the medical and ethical aspects of this problem. I shall briefly try to answer your questions and would like to consider the first three questions together. I understand the question of human life has both religious and philosophical implications and I believe medicine and science can provide an answer, but I do not believe the questions should be a "political" one. To an extent, any consideration of the issues brought up by S 158 could be extended to the issue of what is considered to be alive. For example, the cells of the human body are "alive." This includes the sperm cells and the egg cell so long as they are in the body. Once these cells leave the body, they die, as does the fertilized egg. As such, I do not believe the statements in S 158 about human life are accurate or scientifically defensible.

In regard to the impact of this legislation, I believe it would have a severe adverse effect on the lives and health of American women and seriously hamper the reasonable and safe practice of medicine. The use of certain contraceptives, especially the intrauterine device, would be proscribed and genetic screening would be defined out of existence. In my view, this legislation is detrimental to the health of American women.

I will be happy to try to provide further information if you desire and I appreciate the opportunity to write to you about this issue.

Sincerely yours,

Arthur L Herbst

Arthur L. Herbst, M.D.

ALH/ps

Yale University

SCHOOL OF MEDICINE
333 Cedar Street
P.O. Box 3333
New Haven, Connecticut 06510
Department of Obstetrics and Gynecology

May 13, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C.

Dear Senator Baucus:

As an American who has been particularly proud of his country's protection of the individual rights of its people, I am appalled by Bill S158. This document is not only predicated on a premise which can never by proven, but its institution would cause anguish for millions of pregnant, or potentially pregnant, women and their families.

The Bill states that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception". There are absolutely no scientific data to support such a statement. In fact, the issue is not a scientific one, and no experimental evidence can validate a conclusion that could only have been fabricated from the moral or religious convictions of those who spawned the bill.

The bill, if passed, would embody the antithesis of democracy by stifling an individual's freedom of choice, and if enacted, would have disastrous consequences. It would negate a woman's option to terminate a pregnancy when tests show early in pregnancy that her fetus has one of many conditions resulting in a deformed, severely handicapped, or mentally deficient child who could lead a life of anguish prior to an early demise. The bill would even outlaw termination of pregnancy when uniformly lethal conditions such as fetal anencephaly or absent kidneys are diagnosed. To require these women to continue their pregnancies to term would be callously inhumane. The "fall out" would even alter standard obstetrical management of conditions such as hydatidiform mole (a proliferation of placental tissue which may not have the form of a fetus, but has the chromosome makeup of a female, 46,XX). Minidose birth control pills and intrauterine devices, which theoretically act after the union of sperm and egg, would have to be abandoned in patients in whom no other contraception is tolerated. Even the potentially lethal ectopic pregnancy must be considered human and inviolate under the proposed law.

As a resident physician in the early 1960's I frequently treated young women critically ill as a result of septic abortion. The law at that time rarely deterred these women from having an abortion. It simply prevented them from having a safe one. This bill would have similar consequences.

The question of "when does life begin?", or what constitutes human personhood, is scientifically an unanswerable one. However, if one asked the question, "Can those individuals born into our society who must deal with their own problems of suffering and who must share, along with other members of our society, in assuming the cost of other's problems benefit from such an oppressive bill?" The answer is obvious.

Sincerely,

John C. Hobbins, M.D.
Professor, Departments of
Obstetrics and Gynecology and
Diagnostic Radiology
Director of Obstetrics, Yale-
New Haven Hospital
Director, Maternal-Fetal Medicine,
Yale University School of Medicine

JCH/kp

MICHIGAN STATE UNIVERSITY

MEDICAL HUMANITIES PROGRAM
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EAST LANSING · MICHIGAN · 48824

1981 APR 28 AM 10 50

April 24, 1981

Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I have just received your letter of April 14, and regret that I was not able to reply prior to the April 23 and 24 hearings on Senate Bill 158.

In answer to your questions, I firmly believe that human personhood is not a medical or scientific question; rather it is moral, ethical and philosophical.

Indeed, it is my position that at conception, while life is surely present, and while the life is that of a human being, this fertilized ovum is clearly not a "person". Personhood has to do with the capacity to think, relate to others, love, plan ones life, and the like; in other words those aspects of humanity which characterize us as people and upon which our constitutional rights are based.

I would completely agree, therefore, that medical and scientific data alone cannot determine what the definition on human personhood should be in the present context.

If I can be helpful in any other way please let me know, for I am totally opposed to the enactment of this legislation.

Yours very sincerely,

Andrew D. Hunt

Andrew D. Hunt, M.D.
Coordinator
Medical Humanities Program

ADH/rg

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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DEPARTMENT OF PEDIATRICS

UCLA SCHOOL OF MEDICINE
HARBOR GENERAL HOSPITAL CAMPUS
1000 WEST CARSON STREET
TORRANCE, CALIFORNIA 90509

May 6, 1981

Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Mr. Baucus:

I appreciate your communication requesting my response to Senate Bill 158 which purports to define the time of beginning of human life. I have followed the initial hearings with great interest and find it utterly remarkable that "scientific" witnesses have been, for the most part, so adept at masking theologic, religious, and philosophical points of view in the terminology of science. While there is little question that a fertilized egg is a living cell, so is a white blood cell or a skin cell similaraly "alive" when taken from a human being. Also, such cells have the potential for becoming a human person. Recent experiments in which the nucleus of a skin or blood cell are placed within an ennucleated fertilized egg have indicated, at least in lower forms, that all of the genetic information exists within such a nucleus to direct the development, growth and future "being" of the intact organism. It is just this fact that makes the argument so impossible, in scientific terms. If S.B. 158 purports to define that a living cell has personhood and humanness, then discarding a blood sample or a skin culture, or any human tissue for that matter, is tantamount to doing away with personhood. Clearly, the issue of humanness or personhood is not one which is readily defined in scientific terms. Unquestionably this is a matter of philosophical, religious, or political definition. The far reaching and potentially catastrophic implications of defining a living cell as having personhood goes to enormous extremes in undermining the very nature of separation of powers as instituted in the Constitution by the founding fathers.

The arguments of Lejeune and Goldman, which I witnessed on public television, are simply theological and philosophical ones masqueraded in the guise of science. It seems critical that it be clarified whether or not Senator Helms wishes to define human life versus personhood and humanness. If the implication is to define the latter, then the notion of the fertilized egg having humanness or personhood is entirely unscientific. If, on the other hand, he wishes to define humanness and personhood as that being associated with a living cell, then he has opened enormous problems with regard to other living cells of human origin.

Needless to say, this is a rather brief response to what is, in some people's judgment, a complicated matter. I honestly believe the issues can be clarified by a seemingly more simplistic definition of the issues involved. Please feel free to contact me if further information or opinions are desired.

With best wishes in your efforts...

Sincerely yours,

M. M. Kaback

Michael M. Kaback, M.D.
Professor, Departments of Pediatrics
and Medicine
UCLA School of Medicine
Associate Chief, Division of Medical
Genetics
Harbor-UCLA Medical Center

MMK/kp

DUKE UNIVERSITY MEDICAL CENTER

Department of Pediatrics
Office of the Chairman

1981 JUN 12 AM 9 15

5 June 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

In mid-May I received a letter from you reguarding hearings on S. 158. At that time, I chose not to reply, confident that you would receive abundant information from even more knowledgeable individuals. However, recent news stories and developments in Congress lead me to major anxieties as to the direction things are going. Therefore I have chosen to respond, even at this late date, in hopes that my comments may be added to those of others which you have already received.

To answer your four questions succinctly:

1.) Human personhood is not primarily a medical or scientific question.

2.) Human personhood is primarily a moral, ethical, philosophical, and religious question.

3.) No medical or scientific data alone can determine how human personhood can be defined in the present context.

4.) As I understand it, obviously not a trained legal professional, S. 158 would eliminate all options available to individuals except as due process procedures were established for special cases.

As the bill is written, I believe it would destroy a family's rights to make choices. This ranges from the situation where a known fatal disease can be diagnosed antenatally by amniocentesis through the situation of a woman who is pregnant as a result of rape or incest. This is not an acceptable situation from my perspective.

Sincerely,

S.L. Katz

Samuel L. Katz, M.D.
Professor and Chairman

SLK:tj

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Baylor College of Medicine
DEPARTMENT OF OBSTETRICS AND GYNECOLOGY • 713 521-3233

April 23, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I have given your letter considerable thought and will try to express my opinion as briefly as possible. At the present time, I feel it is impossible scientifically and medically to state when human personhood begins. This is purely a moral, ethical, philosophical, and religious question. I personally would consider it an infringement upon my personal beliefs to have Congress categorically tell me when human life begins. This is not a political question.

If medical and scientific data alone cannot determine exactly when "human personhood" begins on the basis of present knowledge, I do not see how members of Congress, for the large part having very little medical and scientific background, can make this decision.

Sincerely,

Raymond H. Kaufman, M.D.
Ernst W. Bertner Chairman
and Professor

RHK/pvb.

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SCHOOL OF MEDICINE
DEPARTMENT OF OPHTHALMOLOGY
301 E. Muhammad Ali Blvd.

1981 JUN 26 AM 10 18

June 19, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

Thank you for your recent inquiry concerning the legal definition of "human personhood". I appreciate the thoughtfulness of your inquiry and am pleased to respond on the basis of a spiritually rewarding life in medicine including Pacific service in an Army hospital, many years of good private practice, and subsequent years as chief of our nation's largest eye hospital, and then more recently as dean of our School of Medicine. You raised points of broad moral and even religious import. You also clearly approach areas of medical decision which, in this nation, have traditionally constituted an intimate and personal contract between patient and physician. Frequently, the concerns and the decisions of this type are extremely individual and not well suited either to the legalistic steps of interpretation or the time required and the delay imposed in individual cases. The errors in medical decisions are probably best minimized when the concerns are kept as close as possible to the patient. Errors increase as decision-making is removed from the bedside of responsible patient and responsible doctor to politically sensitive medical societies, university boards and even legislative halls.

The first question which you raise is in regard to dating the time of conception. This has been erroneously defined in much of the earlier medical literature on embryology. In any given individual it may also be extremely difficult to date in a precise fashion. Furthermore, the actual sperm cells and ova are living long before they unit with one another. Thus, these genetic cells of the human reproductive system might, by another definition, be considered life themselves.

S.158 contains a breadth of concepts in regard to which it would be preferable to remain silent. Some of the wording does not ring with good logic. For example, life does carry with it race, sex, age, health, defects, and many conditions of dependency. This dependency requires that early life be harbored in a special environment of the uterus. Certain defects of the evolving human cause the uterus to expell its contents.

There are many active changes in the capability of medicine to predict these defects and to avoid crippling illnesses. With thorough commitment, we almost

Senator Baucus
June 19, 1981
Page Two

have today the capability to eliminate diabetes from future generations. At present, this is not only a life-long serious disease but has now become one of our most common causes of blindness. In these issues, it may be neither timely nor judicious for physicians or for lawyers to take entrenched positions carved in stone. In our looking ahead to better life and better health for future generations of Americans we should keep open the options which may change rapidly in the next few years. These options may permit entirely new concepts in genetic planning and these should be very responsibly and morally supervised with maximum input from those who may mold and later care for their products.

Thank you for the time and effort taken by you and your staff to make this inquiry.

Very truly yours,

Arthur H. Keeney, M.D., D.Sc.
Dean Emeritus
Distinguished Professor of Ophthalmology

AHK:hp

The University of Iowa
Iowa City, Iowa 52242

The University of Iowa Hospitals and Clinics
Department of Obstetrics and Gynecology

(319) 356-3605
If no answer, 356-1616

1847

April 28, 1981

Mr. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Baucus:

In answer to your recent communication, I would make the following comments: I do not believe human personhood is a medical and scientific question. Second, I view this question of human personhood as moral, ethical, and philosophic, not religious or political. Third, I feel that medical and scientific data alone cannot determine what the definition of human personhood should be at the present time.

Sincerely,

W. C. Keettel

W. C. Keettel, M.D.

WCK:ad

NOT ON MAILING LIST

THE MILTON S. HERSHEY
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Department of Pediatrics / Division of Genetics

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

June 4, 1981

Dear Senator Baucus:

I would like to respond to Senate bill 158 from the point of view of a researcher in human genetics. While I believe that the question of the "human or "person" nature of the fetus is a religious and not a scientific question, there is at least one other issue to consider in light of this bill.

A total ban on abortion would greatly curtail human genetic research in this country. This is because the major impetus for research is the near-term prospect of developing tests which will detect affected fetuses. In turn, this prenatal testing would only be practical if parents clearly have the choice of abortion. The prospect of curing most genetic diseases during the next 10-20 years is remote, in spite of our sophisticated genetic technology. Thus, without the realistic goal of a prenatal test, the practical justification for funding this research would be lost. Better understanding of all genetic diseases would be severely retarded as researchers would be forced to leave clinical genetics, in order to obtain grants, and new investigators, of course, would avoid the area. Some American scientists, intent upon continuing their research, would be drawn overseas to Britain, France and Germany. These countries welcome American geneticists and are actively recruiting them, even now.

I hope that you will consider this problem in your evaluation of S. 158. The United States is a leader in clinical genetical research, but the impressive gains could be quickly erased in the climate created by an anti-abortion law. I appreciate your attention and wish you luck in tackling this difficult problem.

Sincerely,

George Keller

George H. Keller, Ph.D.

THE UNIVERSITY OF ARIZONA
HEALTH SCIENCES CENTER
TUCSON, ARIZONA 85724

COLLEGE OF MEDICINE
OFFICE OF THE DEAN
(602) 626-7383

June 1, 1981

Honorable Max Baucus
U.S. Senator
Washington, D.C. 20510

Dear Senator Baucus:

In reference to evaluating S. 158, the following paragraphs speak to your specific questions.

1. Do you believe that the question of human personhood is a medical and scientific question? No.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? Yes.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? No.

4. What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

The proposed law, by its very nature, is intended to be limiting. Hence, a degree of freedom in the decision making process concerning abortion is to be lost to all practitioners of medicine and indeed to pregnant women having to make decisions.

The role of screening and counseling would be considerably changed if the opportunity for voluntary abortion were lost. The impact of determining the status of genetic defects and other aspects of pregnancy prior to birth would be considerably changed. This would have emotional, psychological and economic impact.

Depending on the interpretation of the law it is conceiveable that there could be prohibitions to contraceptive prescribing.

Honorable Max Baucus
June 1, 1981
page 2

A change in over-the-counter sales as now existent might be influenced. The downstream effect of that on the incidence of unwanted pregnancies and venereal diseases is unpredictable.

In the general context of other observations, clearly one can only speculate. Surely were abortion limited, the impact on the indigent and weak in our society would be great.

Sincerely,

Louis J. Kettel

Louis J. Kettel, M.D.
Dean

LJK:mm

INDIANA UNIVERSITY
Medical Center
1100 WEST MICHIGAN STREET
INDIANAPOLIS, INDIANA 46223

DEPARTMENT OF
OBSTETRICS AND GYNECOLOGY

June 10, 1981

The Honorable Max Baucus
United States Senate
Subcommittee on Separation of Powers
Washington, D.C. 20510

Dear Senator Baucus:

As concerned providers of health care for women, we feel compelled to express our opposition to S.158, the Helms' "Human Life" bill.

The question of when true human life begins is a complex one, and has been a subject of discussion for philosophers, scientists, and individuals of conscience for many hundreds of years. An artificial "simplification" of this issue by legislative edict does a disservice to women, their unborn fetuses, and humanity in general. We must resist the urge to arbitrarily define by law what is actually a scientific and moral dilemma. The medical implications of this bill are also quite disturbing, as it would seriously complicate management of areas such as spontaneous abortion, molar pregnancy, and contraception (to name but a few).

S.158 represents a well-intentioned but foolhardy approach to this complex subject. We urge you to vote for its defeat, and urge your colleagues to do the same.

Yours truly,

Constance A. Kenceus M.D.
Gordon R Huey MD
James A. Maurer MD.
Sandra R Brown. MD
Duffy C. Murphy MD
Phillip Patton
James Rotund MD
Kurt W. [illegible] M.D.
Ann Bromer M.D.
Steven Friedman MD

Lynda R. Smutz MD
Debra L Cook MD
Paul Schoon MD
Al Hartsoff
E W Davis /MD
Nicholas Logan MD
Timothy L Bennett MD
Becky L. Yeager M.D.

Constance A. Kincius, M.D.
Gordon R. Huey, M.D.
James Maurer, M.D.
Sandra R. Brown, M.D.
Duffy C. Murphy, M.D.
Phillip Patton, M.D.
James Noland, M.D.
Kurt Stiver, M.D.
Ann Bromer, M.D.
Stewart Friedman, M.D.
Lynda R. Smirz, M.D.
Debra L. Cook, M.D.
Paul Schoon, M.D.
Alan Hartsough, M.D.
Ed Davis, M.D.
Mark Logan, M.D.
Timothy L. Bennett, M.D.
A. R. Gillespie, M.D.
Becky L. Kleager, M.D.

cnh

cc: President Ronald Reagan
Senator Jesse Helms
Senator Dan Quayle
Senator Richard Lugar

MICHIGAN STATE UNIVERSITY

DEPARTMENT OF OBSTETRICS, GYNECOLOGY AND
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1981 APR 27 AM 9 17

April 21, 1981

The Honorable Senator Baucus
The State of Montana
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your recent letter and query relative to Senate Bill 158 introduced into the 97th Congress on January 19, 1981. I'm pleased at the opportunity to comment on the issue of the scientific definition of the onset of human life.

The scientific definition of life is not easy but possible. The atomic composition of living human structures of necessity includes carbon atoms, and energy is consumed in maintaining the non-random distribution of matter which comprises such structures. Living [illegible] have the capacity to react with their environment, that is the non-living matter surrounding them, and to change. The characteristics of life originally derived from the study of the function of those gross plant and animal entities intuitively recognizable as living include the capacity for excitation, respiration, circulation, metabolism, excretion, reproduction, and coordination of functions. In multicellular life forms, specialization, with the predomirant dedication of some functions to groups of cells, that is tissues and/or organs, is an important organizational feature. In the early part of the 20th century, biologists were able, through a series of observations on structure and function of living cells, to extend the definition of life to single cell organisms in the plant and animal kingdoms by recognizing the characteristic functions in them.

In terms of this definition, human sperm cells are alive; so are ova. So, too, is the conceptus which forms from their fusion. Having undergone specialization for reproductive function, these human living cells confirm the definition by exhibiting change. Clearly, to a biologist, life is not created by conception; during that event living cells only undergo a series of unique, vital, and fascinating changes. Subsequently, life continues through ontogeny, the series of processes which mark individual development.

From a scientific point of view, the question of when life begins must be referred to the time, hundreds of thousands of years ago, when the first single cell organism, definable as living as above, first appeared on earth. Human life began somewhat later, still in antiquity, with the appearance of a life form characterizable as a member of our species. To ask when life begins in the course of ontogeny in a scientific sense is to ask a biologically meaningless question since ontogeny begins with the modification of human life and ends with death.

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Senator Baucus
April 21, 1981
Page 2

The real question embedded in Senate Bill 158 is not a biological one, but has to do with the time in ontogeny at which an individual acquires characteristics which entitle him to the rights of an individual in law. The traditional basis of our legal structure and a consequence of the corporate decision of our society to adopt rule by law, rests on the proposition that elements of law are formed from the consensus of those governed, and who thereby wish to subject themselves to adhering to that mutual agreement. Clearly, with respect to time of onset of individual rights in ontogeny, there is no consensus. Those who posit an answer based on science to this question are either ignorant of the meaning and content of science or, recognizing the absence of consensus in the political sense appropriate to an element of jurisprudence, wish to deal instead with a meaningless question, for which there is no answer and around which obfuscating debate may continue without end. It is not possible to base any argument with respect to the time of onset of human life in the course of ontogeny on scientific and biological principles. To attempt to do so is either an act of stupidity or of fraud.

Sincerely yours,

Thos Kirschbaum

Thomas H. Kirschbaum, M.D.
Professor and Chairman

THK/md

Department of Pediatrics
304 293-4451

School of Medicine
Medical Center
Morgantown, West Virginia
26506

West Virginia
University

May 26, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Honorable Baucus:

I am quite happy to respond to your letter of May 13, 1981 asking my opinion as to S.158. I am sorry to be in total disagreement with this bill.

Human life and human personhood is a medical and scientific question and it is my view that human life does not exist to the point of conception but rather when that life is viable in utero.

I believe in the right of the individual woman to decide whether to maintain the conception or to terminate it.

Of most importance, I believe in the right of the newborn baby to be born as a wanted child.

In my judgment if S.158 is enacted, it would be one of the most detrimental happenings that I could envision.

I very much appreciate the opportunity to respond as regards the bill S. 158 and commend you for requesting our opinions.

Sincerely,

Wm G Klingberg
William G. Klingberg, M.D.
Professor and Chairman

WGK:bll

UNM
THE UNIVERSITY OF NEW MEXICO
SCHOOL OF MEDICINE
ALBUQUERQUE, NEW MEXICO 87131

22 June 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

My apologies for being so tardy. As you stated in your letter, this problem is both complex and difficult. As a person involved in perinatal medicine, I believe that the reproductive cycle must be studied from both a medical and scientific standpoint, but that the term human personhood obviously includes all of the choices in your second question - moral, ethical, philosophical, religious and political considerations. It is my personal opinion, that the philosophical and religious considerations are more strongly related to the term human personhood, while the medical considerations actually reflect viability, and psychosocial issues of pregnancy. In my judgement, Senate Bill 158 would definitely affect my practice of medicine. As a pediatrician who cares for the acutely ill newly born infant, one of our major goals is to prevent problems associated with prematurity and genetic or metabolic disorders. Of course, if abnormalities of the fetus are identified in the first trimester, we must first have the option of doing appropriate genetic screening and second give the family the option to consider the possibility of having an abortion. In certain instances, none of these considerations would occur unless the considered privilege of using contraceptive devices is outlawed.

In a few words, I do not support this bill.

Respectfully yours,

Herb Koffler MD

Herb Koffler, M.D.
Associate Professor of Pediatrics,
Obstetrics and Gynecology
Director of Newborn Services

HK:sah

STATE UNIVERSITY
OF NEW YORK
DOWNSTATE MEDICAL CENTER

• DEPARTMENT OF OBSTETRICS AND GYNECOLOGY

1981 MAY 11 AM 10

May 6, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am sorry not to have replied sooner, but your letter of 14 April, 1981 has only just arrived. I see that mail originating in your office is subjected to delay similar to that experienced by me.

I am pleased to respond to your questions in re "human personhood". I do not perceive human life to begin legally at the time of conception. Even under the most favorable of conditions, an appreciable proportion of conceptuses do not grow and mature. A conservative estimate is that 20 percent suffer inability to develop and mature. At the time of conception and for several weeks thereafter, the conception is a mass of cells which is not a recognizable "person" by any means. Certainly this "mass of cells" is not capable of independent existence outside of the uterus or other site of implantation. In fact, even with the life support systems now available to us, sustained and meaningful life, extrauterine, is not realistic before the 26th to 28th week of gestation. Further, fetuses of such tender gestations suffer exceedingly high frequencies of mental and physical disability. As a non-legal person, but as a physician of 40 years experience, I can appreciate no "personhood" until live delivery and separation from the mother's life support system.

Your direct question, "Do you believe that the question of human personhood is a medical and scientific question" is not for easy response. I agree that the process which may result in "personhood" does begin at conception. So, too, does an oak tree begin with implantation of an acorn. I find it difficult to equate the acorn and its rooting and germination with the "sturdy oak". The question is answered for me, as a scientist, by when there is an independent entity capable of survival in whatever environment is to receive the entity. Then

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Page two
Senator Max Baucus

"personhood" is a reality. Any deviation from this is a legal determination and not a scientific one, in my opinion.

One may wish to make the determination of personhood a "moral, ethical, philosophical, religious or political question", but for me it is a scientific one. My interests and background do not require that I be responsible for some other person's positions. Rather, I must have the right to express my opinions and attempt to influence others towards my convictions. I must conscience them and not "legislate them".

I believe that medical and scientific data can supply definitions for human "personhood". Further, I hold that scientific, philosophic and religious definitions need not be uniform. It is imperative that these different definitions be appropriately labelled so that the persons using the definitions make it abundantly clear as to which definition is in use. The various ones must not be confused by the presenter nor the hearer.

Also in our capacity as conscientious citizens we must give heed to the needs and requirement of our fellow citizens, our country and the world in which we live at any particular point in time.

With many thanks for the opportunity given me to express myself on this important matter, I remain

Sincerely yours,

SGK:so

Schuyler G. Kohl, M.D.
Professor

UNIVERSITY OF OREGON
HEALTH SCIENCES CENTER

CRIPPLED CHILDREN'S DIVISION

CHILD DEVELOPMENT AND
REHABILITATION CENTER

P.O. Box 574

Portland, Oregon 97207

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In reply to your letter of May 13, 1981, my answers to the specific questions you pose regarding S. 158 follow:

1). Do you believe that the question of human personhood is a medical and scientific question?

No. Not as defined in S. 158.

2). Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

Yes, All of the above.

3). Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

No.

4). What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

If passed, S. 158 would infringe on the rights of the individual to make informed decisions about child-bearing. As a physician who practices clinical genetics, I believe I have the responsibility to help prospective parents understand and weigh the genetic risks to their children if they request this information. I also believe they have the right to act on that information whether the action is pre or post-conception.

Senator Max Baucus
June 3, 1981
Page 2

Most of the existing and rapidly improving scientific methods for genetic screening and prenatal diagnosis would become ineffective intellectual exercises if S. 158 is enacted. Given the progress in elucidating the underlying genetics mechanisms that cause serious genetic diseases, such as Tay-Sach's, Huntington's chorea and Thalassemia major to name a few, another generation of prospective parents may be offered effective treatments for such conditions. At least that is the goal of scientists working in this field.

Until such treatments become available, I would question the propriety of a bill that requires all such affected pregnancies to be carried to term. Can the Senate also provide financial and psychologic assistance for the parents who are forced to incur such a burden?

Respectfully,

R D Koler

Robert D. Koler, M.D.
Professor and Head of Medical Genetics
Department of Medical Genetics

P.S. I have taken the liberty of showing your letter to other clinical staff who may also respond.

RDK:ak

LEWIS H.
KOPLIK
M.D. F.A.C.O.G.

LA MESA MEDICAL CENTER, SUITE W-12, 7000 CUTLER AVENUE, N.E., ALBUQUERQUE, NEW MEXICO 87110 505/883-5787

1981 MAY 14 AM 11:00

May 11, 1981

Senator Max Baucus
U.S. Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am enclsoing for your information a copy of testimony I would like to present in person before the subcommittee on the Separation of Powers when hearings resume on SB 158.

I have attempted to analyze why I feel the statement about human life presented by Senator Helms in SB 158 is so incorrect from a scientific, medical and obstetrical perspective. In addition, my analogy of baking a cake with pregnancy illustrates the difference between the process of becoming and an instantaneous moment of being.

Any help you may provide in facilitating my request to appear to testify would be greatly appreciated.

Sincerely,

Lewis H. Koplik, M.D.

LHK:rw
enc.

LEWIS H.
KOPLIK
M.D. F.A.C.O.G.
LA MESA MEDICAL CENTER, SUITE W-12, 7000 CUTLER AVENUE, N.E., ALBUQUERQUE, NEW MEXICO 87110 505/883-5787

April 24, 1981

Mr. Craig Stern, Council
Subcommittee on the Separation of Powers
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Stern:

I spoke with Mrs. Cynthia Rampz by phone today about the possibility of my testifying before Senator East's subcommittee concerning basic medical problems with the definition of a person adopted in S. B. 158.

I would appreciate having the opportunity to appear before the subcommittee before the taking of testimony is ended for my understanding of many normal and pathological obstetrical and gynecological conditions either directly contradicts the evidence you have already heard or is greatly befuddled and confused if that definition of a person is used.

Specifically I would like to present information that deals with spontaneous abortions, blighted ova, human placentas, identical twinning, all in the area of normal conditions, and Siamese twinning, hydatidiform molar degeneration, acardiac monsters, and parasitic twinning, in the area of gross pathology. I would also like to touch on the possibility of human cloning which is science fiction now but a reality with respect to amphibian species.

This information would clearly demonstrait that a human being, a person, is not present from the moment of conception. If it were true then twins become half people and the legal ramifications of that position are mind boggling.

I shall be at a medical convention until Wednesday of next week, April,29th. I could be reached by leaving a message at the hotel where I will be staying in Dallas, The Dallas Dunfey, at 214-357-9561. After Wednesday my home phone is 505-266-0579 and my office phone is 505-883-5787.

Thank you for your help. I am sure these have been extremely difficult hearings to schedule.

Sincerely,

Lewis H. Koplik, M. D.

A MEDICAL AND SCIENTIFIC RESPONSE TO " WHEN DOES HUMAN LIFE BEGIN? "

BY

LEWIS H. KOPLIK, M. D.
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FOR SUBMISSION TO THE CONGRESSIONAL RECORD

CONCERNING SENATE BILL 158

A MEDICAL AND SCIENTIFIC RESPONSE TO WHEN HUMAN LIFE BEGINS

The definition of when human life begins is, at best, an ambiguous one scientifically, but more probably an irrelevant one. It is only approached when the demands of religion and law require its contemplation. At times such as these it is extremely important that scientific disciplines state unambiguously what limitations are inherent in their inquires.

In this paper there are terms that may be unfamiliar to those outside the medical areas. This is not done to confuse the issue but because those terms are precise and have meaning to the author. Clear explanations of their meaning may be easily found in texts of embryology, obstetrics, and pathology.

The life of an independent organism occurs through a process called reproduction. It does not occur at an instant in time but over a period, in the time continuum. This observation is easy enough for us to understand when talking about the fertilization, seed development, and germination of a flower or plant, or when discussing mitosis in an amoeba. It is only when our egos and belief systems interact with scientific observations that we require a more miraculous occurrence in the human species than we require in all other plant and animal forms.

In all of biology new life comes from an alive organism which is similar to it. Bacteria do not form cows, neither do rocks give birth. The inanimate does not develop into the animate. Even new life forms, whether new bacteria or new dog breeds, begin with what is live and closely related to it in genetic appearance. When there have seemed to be events which contradict this it was because our knowledge was incomplete. An example of this was in the Middle Ages and before when maggots were thought to spontaneously generate from rotting matter.

Life began eons ago in one or many places. In modern time it has not begun again. Human and all life is a flow of living to living, and associated with this is death, the ending of one individual's life cycle. The beginning of the independent existence of an individual occurs in the process of either sexual or asexual reproduction, depending on whether there are two or one parenting organisms. Scientifically the difference between these forms of reproduction involves the chromosomal constitution of the offspring. In asexual reproduction, whether this involves the fission of an amoeba or the cloning of a frog, the offspring is virtually identical, chromosomally, with the single parenting organism. In sexual reproduction the progeny combines the genetic characteristics of two parents through the marvels of D.N.A. and R.N.A. replication and interaction. As human beings we clearly fit into the group which sexually reproduces, though, when considering cloning, asexual reproduction must remain a possibility. Both forms of reproduction have been valuable to differing species. Generally speaking the simpler species and those with shorter life cycles rely on the asexual modes, the more complex and those with longer life cycles employ sexual methods. In both groupings there are opportunities for evolution through mutation and adaptation. In both there is also the likelihood for reproductive success and reproductive failure.

In science for an hypothesis to be acceptable it must satisfactorily explain all relevant observations. It is specifically in this area that the statement that actual human life begins at fertilization fails and fails badly! There are many events in human reproduction which are inexplicable if one uses this inaccurate and incorrect hypothesis. The focus is not a single miraculous event at the time of fertilization but rather the process of becoming, and, inherently in that, the possibility of not becoming, the fact of reproductive failure.

That seeds may fall on fallow ground is well known to farmers. But it is still a seed, not a wheat or corn plant but a grain of wheat or a kernel of corn. An acorn is clearly not an oak tree no matter how much one would like it to be so and no matter how miraculous the process of sexual reproduction is, in the oak. In humans ova may also be fertilized and yet never become imbedded in the nourishing "soil" of the endometrium. This passage and ultimate death of the fertilized ovum does not involve the death of a human being but only the death of one or several cells formed by the fusion of male and female gametes. It is a reproductive failure not the death of a person! We do not know how often events like this occur, for there is virtually no way to observe this passage, either directly or indirectly. Some estimate 15% of all fertilizations are lost without implantation, some guess as high as 60%.

If one focuses on fertilization as the essential event in the formation of a human being then efforts to clone human cells should cause no concern or consternation, but they do! Cloned human embryos would not be human beings, just parts of a larger organism, separated from it, much as cells in tissue culture are viewed, nothing special, no person, no ethical, moral, or religious complexity, nothing of note. There would be no reason to legislate against efforts directed at human cloning anymore than there would be or is a need to proscribe efforts which keep the cells of an ampulated finger alive before attempts at reimplantation. The human cloned embryo would be separated from the host body and live, but that is all.

When the conceptus implants in the uterus, tube, or elsewhere, one is now able to document its presence hormonally and in the response of the woman who is now pregnant. The rapidly growing trophoblastic cells release the hormone human chorionic gonadotrophin into the woman's circulation. This hormone may be assayed even before she experiences her first missed menstrual period! But the hormone H.C.G. alone neither constitutes pregnancy nor the presence of a human being even though it is most commonly produced by those cells derived from the fertilized ovum. H.C.G. is also found in both sexes in the absence of pregnancy. It is usually produced by rapidly growing malignant tumors. These tumors are clearly not human beings even though they may share much in common with the invading trophoblast of pregnancy.

During early pregnancy various structures must form properly if the pregnancy's development is to continue. The chorionic villi must develop and tap into the maternal circulation for nourishment and the elimination of wastes, the body stalk, embryonic disc, yolk sac, and amnionic cavity must also form. When the process proceeds correctly the normal placenta, membranes, cord, and embryo are formed and pregnancy continues. When this is not the case, the woman either aborts spontaneously or develops a pathological condition which few would call a human being, known as an hydatitiform molar pregnancy. Under both conditions, the blighted ovum and the hydatitiform mole, implantation occurs, the pregnancy starts its development, there has been fertilization, but there is no embryo. Without an embryo it is difficult to accept any claims that a human being has been formed, even though all the cells are live and are produced after fertilization.

The most frequent reason for pregnancy loss and reproductive failure in early pregnancy is defective fertilization, too few or too many chromosomes remaining in the conceptus. Half of all early spontaneous abortions have been estimated to be caused by this. Sometimes, instead of having 23 pairs of chromosomes, one finds 23 tripled chromosomes. This condition of triploidy is incompatible with reproductive success, there are no human beings with 69 chromosomes, it is a reproductive aberation! This is true scientifically regardless of whether fertilization, implantation, and early cell division and development have begun.

Where is that independent human being if it is not present with fertilization or even at implantation? Maybe it comes into existence when the embryonic plate develops. Certainly now there is a structure which may be followed through embryonic and fetal development to the birth of an infant, clearly a "person" within the meaning of the Constitution! Unfortunately when one focuses on the embyronic plate one runs smack into the dilemma and problem of explaining identical twinning. If there is only one embryonic plate and one discovers two distinct individuals at birth what happened? Are these individuals one or two "persons"?

There have been two explanations proposed by those who support the hypothesis that a human being comes into existence at the moment of fertilization to explain the existence of identical twinning. Each is rather convoluted and unique scientifically but must be so if one is to preserve a faulty hypothesis. The first suggestion is that one human being splits off part of itself to "father" the second human being. This is a remarkable and unique example of combined sexual and asexual reproduction, hitherto undescribed in nature. The second proposition is that the first human being dies and in that process gives birth to two offspring of identical genetic constitution. This explanation similarly has no scientific support for its authenticity but is the best possible if an independent human being occurs with fertilization or by the time the embryonic plate develops and yet one finds there are two or more present at birth.

Within the phenomena of twinning there are several other observations of grossly pathological entities which are also difficult to understand by using the foregoing explanations. Siamese twins may share one heart or one brain, are they one or two human beings? There are fetal monsters with two heads and only one lower torso, as there are other monstrosities with one head and two lower torsos; one or two persons? Strangest of all are the so called parasitic twins and acardiac monsters. For these blobs of tissue to survive a normal twin is essential. It is the heart and circulation of the normal twin which allows the pathological twin's survival up to and sometimes after birth.

If "human beingness" is a miraculous event occurring at fertilization or in the earliest stages of pregnancy, then these known conditions are impossible sticking points. If on the other hand human reproduction is a process with a human being being its successful outcome, then these events and pathological entities are easily understandable and acceptable as deviations from the norm or as reproductive failures.

Another benchmark which might be used in defingin a human being occurs when the embryo changes to a fetus. This happens seven weeks after fertilization. At this point organogenesis is completed, the development of all major organ systems is finished and from that point on growth and maturation continue during the remaining seven months. Unfortunately here too science provides no facts or evidence which makes this point defensible if it is selected.

Viability has also been spoken of as an identifier of human beingness. Viability can only be defined after the fact, for, though there are some pregnancies which can be carried nine months, only at birth does one find out that the fetus can not survive outside the uterus, without the placenta performing its essential functions. Pulmonary hypoplasia and severe, incorrectable, cardiac anomalies are examples of this circumstance.

The final point in the term of a pregnancy is birth. This has been used traditionally both religiously, in some faiths, and legally as the time in which enfranchisement as a human being and person occurs. It certainly marks the successful outcome of the reproductive process if there is live birth and success, not failure, is the scientific criteria used to judge reproduction. When fetal death happens late in pregnancy or even during labor the obstetrical identity would be that of a stillborn fetus, not a dead human being, for it is not the length of time the pregnancy is carried but live birth as an outcome which is relevant.

Perhaps at this point an analogy to a commonly experienced event will clarify the difficulty in identifying a single moment or instant of being as opposed to a period of becoming. When one bakes a cake there is no single moment one may point to when the batter becomes the cake. One starts with something quite different than what one ends up with and yet all the basic ingredients are present in the beginning. In baking one mixes the ingredients together much as the genetic information is mixed together at fertilization. One then places the mixture in a pan and puts it in the oven. When one puts the batter in the oven it is not yet a cake but when it comes out it is, usually. When does it become a cake? I don't know, but that it becomes a cake is clear. To carry the analogy further, the batter will never become a cake if it is not put in the oven or if it is taken out too soon. It will not become a cake if a essential ingredient is omitted, if the proportions are not correct, or if the oven is not turned on. There are many strange, funny tasting cakes taken out of ovens, of many different sizes and shapes. The batter may be poured into several smaller pans to make several cakes, not just one. One expects the process of baking to produce a cake from the batter, and usually this is so. It is one of the daily miracles we have come to take for granted, much like pregnancy.

The foregoing analogy illustrates a process of becoming. It much better accounts for what we understand happens in pregnancy than the expression that one has a cake, a real cake, once the ingredients are first mixed, regardless of their proportions and whether or not they are baked.

The batter is not the cake , the acorn is not the oak, and the fertilized ovum is not a human being!

1981 APR 30 AM 8 57

THE UNIVERSITY OF KANSAS

Department of Gynecology and Obstetrics
College of Health Sciences and Hospital
39th and Rainbow Blvd., Kansas City, Kansas 66103
(913) 588-6200

April 24, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of April 14th. I appreciate your asking my opinion concerning Senate Bill 158.

It is altogether a very difficult problem to separate the religious heritage, the guilts of a society and the subordination of a woman in dealing with the issue of termination of pregnancy. As you probably know, it is the oldest operation of recorded history. The question is whether the United States Congress feels it can legislate morals. No society has ever been able to cope adequately with this problem without a terrible cost in human lives and wracked bodies. Obviously, equality is now a basic morality, and now that the woman has found herself free of the encumbrance of male domination and the procreative acts, she will not relinquish it without a great deal of fight.

In addition, there is on the horizon the new prostaglandins that are extremely effective. They are cheap to manufacture and will become easily obtainable. The vaginal suppository at the present time, the F2 Alpha prostaglandin, will initiate menstruation "induced in early pregnancy". It is over 90% effective within three hours. This will change the entire picture of abortion in our social system. If we cannot control marijuana, I wonder how we will control the prostaglandins?

In carefully reading the law, there is little doubt that it violates the separation of Church and State, as well as the Fourteenth Amendment of the Constitution. Short of a Constitutional Amendment, which is not going to be easy going,

Main Campus, Lawrence
College of Health Sciences and Hospital, Kansas City and Wichita

the attack by the group organized against termination of pregnancy, has no other choice but to be political in nature. One should point out that in the United States over two-thirds of the family units have been touched directly by a termination of a pregnancy. It is surprising, considering the number of individuals involved, how few in the community are aware of the number of abortions. Studies in the State of Kansas demonstrate that religion has no role. The Catholic, Protestant and Jewish woman facing this crisis will find a solution to the problem. In the case of incest and rape, there is no doubt that this will be a real tragedy - the innocent will be sentenced!! Genetic diseases, amniocentisis and the termination of gross congenital anomalies would be ruled out. When I speak of gross anomalies, I speak in part of cyclops, sympodia (mermaid), craniorachisis (without a head and brain), and many other anomalies that are not recognized until a growth of retardation of the pregnant uterus occurs. The woman will be forced to carry this to term with the anquish and the anxiety that will accompany it.

In addition, to say that life begins at conception is a point of conjecture. Life is a continuum on this earth, in any and all forms. It is a matter of Situational Ethic that will determine the value of it at any given time, whether it be a soldier on a battlefield or an intrauterine gestation. The value of a "situation" when it is a part of the mother should remain a part of her right. To say that life began at the time of conception is to acknowledge that choriocarcinoma, that is, cancer of the placenta is in fact a life as it came from a fertilized ovum. Degeneration of the placenta (hydatidiform mole) also began from a fertilized ovum. The treatment of women with breast, lung, and other advancing cancers during pregnancy will be limited. The ectopic pregnancy, to leave it alone would result in death. How does one cope with an abdominal pregnancy (the pregnancy growing in the abdomen) at 24-25 weeks? How does one assure a live infant in concurrent disease if it will compromise the life of the mother? This and many more medical problems cannot be answered by simple legislation.

It is once again the pressure from a small segment of society on legislators to try and control the rights according to one religious view. Over 69% of the public have and do support termination of pregnancy. One should point out that in the formation of this government the Supreme Court was established in part to remove a branch of government from the arbitrary, capricious acts of legislative and administrative personnel who can and do submit to undue pressure in order to survive. The Court, it its wisdom and after very careful consideration on the abortion issue, made it clear that theology and philosophy will continue to tell us what we can be, science will tell us what we are, however, there is no way that one can bridge mediate this gap between the way an individual perceives what they should be and the actual reality of life.

As an educator and a physician in gynecology and obstetrics, if I may be of further help to you in dealing with this enigma, please feel free to call upon me.

Sincerely yours,

Kermit E. Krantz, M.D., Litt.D.
Professor and Chairman
Department of Gynecology and Obstetrics
Professor of Anatomy
Associate to the Executive Vice-Chancellor
for Facilities Development

KEK:ld

UNIVERSITY OF MINNESOTA

Office of the Vice President for the Health Sciences
A-306 Mayo Memorial Building, Box 501
420 Delaware Street S.E.
Minneapolis, Minnesota 55455

June 1, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am pleased to respond to your letter requesting my views on the Senate File 158, as proposed by Senator Helms. I should add that I am appalled by the attempts of Senator Helms and his colleagues who would attempt to define human life in such arbitrary and rigid fashion.

No legislative mandate is going to determine in any way the question of human personhood as being either a medical or scientific capability.

In response to your specific questions, I would like to respond as follows:

1. Do I believe that the question of human personhood is a medical and scientific question?

   To this question my answer is that this is not a question that can be determined in any medical or scientific way. Until we define what life is, we are unable to determine onset of such.

2. Is it my view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

   My answer to this is again similar to the one above. If you would believe the moralists, the philosophers, or religious or political leaders, each would suggest that their area of expertise should be the determinant of human personhood. The mere fact that so many claim authority in this area suggest that none have the answer or should have the option and responsibility of defining it.

3. Do I believe that the medical and scientific data alone can determine what the definition of human personhood should be in the present context?

   My answer to this is categorically no. There is no data at the present time that can define this for us.

The Honorable Max Baucus
June 1, 1981
Page 2 of 2

4. What, in my judgment, would be the impact if S. 158 is enacted?

My answer to this is that it would have incredibly negative impact on the practice of medicine and on the research in genetics. Theoretrically, the use of contraceptives that interfer with the newly fertilized ovum, etc., would be seriously impacted as well. I do not believe there is any role for such a bill as suggested in S. 158.

As you probably gather, in my view the area of human rights amendment would seriously jeopardize the freedom of the American people to manage their own lives and family. To legislate a definition of life, to legislate at which point life begins, is not within the purview of the legislative process. Lacking definition of life, lacking definition of onset of life, I feel that it is ridiculous to assume that any individual legislator can make such decisions.

I therefore support the concept of freedom of choice, and would leave the decision of contraceptives, abortion, etc., to the individual woman and family.

I will convey to you my strong feelings on the issue; I do not want my morality, my ethics, my philosophy, my religious beliefs to be legislated in this manner.

Very sincerely yours,

John

John W. LaBree, M.D.

slj

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June 4, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 21510

Dear Senator Baucus:

Thank you for your letter of May 13, 1981 asking my views and opinions on the very complex and difficult question of the definition of human personhood.

I reviewed the bill S-158 proposed by Senator Helms. I was stunned to see the statement that "the congress found that the present day scientific evidence indicates the significant liklihood that actual human life exists from conception" (page 1, line 6-8). This statement is incorrect. It could also be stated that present day scientific evidence does not indicate a significant liklihood that actual human life exists from conception. There is simply no scientific evidence whatsoever in either direction. We simply don't know the answer. Therefore to answer your four questions proposed: 1)I do not believe that the question of human personhood is a medical or scientific question. 2)It is, rather, a moral, ethical, philosophical, religious and/or political question. 3)I do not believe that medical scientific data alone can determine the definition of human personhood in the present context, nor do I believe that any other data such as moral, eithical, philosophical, can do it. 4)In my judgement, enacting of this bill will do a tremendous damage to our society. It will put us one giant step backwards. I do object to abortion for non-justifiable reasons such as maternal convenience. It will be equally wrong if we prohibit abortion for any reason. It takes time to make progress in a complex society like ours. To wipe out all of our progress in the past 20 years overnight, is really very unwise. I am sure you are well aware of how many billions of dollars we spend to take care of all the mentally and physically, severely handicapped citizems. Many of them do not even know they are in this world. Passing this bill not only will make the practice of medicine, of genetic screening, of prevention of mental retardation impossible, but also will severely hamper and retard the research along these lines. I hope the progress of our society is not made by swinging from one extreme to the other. If we are not wise today, we will pay our price tomorrow.

I believe you as well as other senators, are very well informed and for a serious question like this, the answer should come from everybody's conscience rather than emotional or political reasons.

Thank you very much for allowing me to have this opportunity to express my personal as well as professional view. With best personal regards, I am

Sincerely yours,

Ming-liang Lee

Ming-liang Lee, M.D.,Ph.D.
Associate Professor of Pediatrics
Chief, Division of Medical Genetics

MLL:jl

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and Academic Vice-President
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May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your inquiry regarding my evaluation of S. 158. To respond to your specific questions:

1) I do not believe that the question of human personhood is a medical or scientific question. Your choice of the word "personhood" illuminates the issue. Science can distinguish between life and non-life in a single cell. The decision as to when personhood is present or absent is beyond the purview of science or medicine.

2) I believe that the question of human personhood is a moral, ethical and philosophical question and therefore, as I understand those realms, a single, universal, eternal answer is not possible. There are divergent interpretations between and within religious communities. The Supreme Court recognized this in its decision, remanding the issue to each individual's ethical stand. It is at present a political question in which one ethical interpretation seeks to prevail over all others through the legislative process.

3) As a scientist and physician, I would not presume to invoke the data of those disciplines to define human personhood anymore than I would argue from them the merits of capital punishment.

4) The impact of enactment of S. 158, in my judgement, will be the return to most of the horrors that preceded the Supreme Court's decision. As a medical student and house officer in the 1940's and 50's, I saw too many young ghetto women critically - and sometimes mortally - ill after the ministrations of a medically untrained abortionist or their own desperate attempts to terminate a pregnancy. Cervical dilitation and uterine curettage were

ESTABLISHED IN 1913 AS THE MARQUETTE UNIVERSITY SCHOOL OF MEDICINE

performed for "diagnostic" purpose by some unscrupulous physicians for profit, and by some sincere physicians whose moral, ethical beliefs - along with those of their patients - was antithetical to the then-existing law. Genetic screening would become pointless. History also contradicts the hope that making abortion illegal will halt unwanted pregnancies by promoting the use of effective contraceptive measures. Effective contraceptives were readily available in the 1940's.

Ethicists have taught me that there are ethical principles, which generate ethical rules of behavior, which in turn are subject to ethical exceptions dependent upon circumstance. The encoding of an ethical principle into law denies the delicate analysis of surrounding circumstances which should direct ethical decisions in medicine.

Thank you for your attention to this important issue and for the opportunity to express my view. My comments are mine alone and do not necessarily reflect those of my institution. Indeed, within a faculty of scientists and physicians, there exist divergent ethical positions about this issue. This reinforces my view that the answer does not lie within science or medicine.

Sincerely,

Edward J. Lennon, M.D.
Dean

EJL:je

10 Plaza Street
Brooklyn, NY 11238
May 14, 1981

Dear Congressman:

In considering the present bill on defining when Human life begins, in order to settle the larger question on abortion, I feel the following is of paramount importance.

There is no doubt that at conception a one cell, two cell or 100 cell embryo is alive. But is it "human" is the question to be answered. One must first define human and I feel that the only definition possible is a rational (meaning able to form concepts) being. In order to be able to form concepts one must have a functioning cerebral cortex. A two cell or 100 cell embryo does not have a functioning cerebral cortex and so can not form concepts and therefore is not "human life" (it is alive).

The logical answer to this argument would be "but it has the potential to become human". That is true, but killing a potential (which therefore does not exist now) is not equivalent to killing the actual (that which does exist now) and so is not the same as committing murder. Every cell in a human's body has the potential to become an independent human being yet no one would prosecute a surgeon for murder for removeing a small piece of any normal human tissue, nor a person who is in a fight and scrapes off a piece of skin of the person he is fighting with. This argument may seem absurd but it seems to me just as absurd to say it is murder to kill an embryo which is not NOW a human being.

The final question then becomes, so when does HUMAN life begin. Certainly at birth the cerebral cortex does exist and functions and the child is human. Just as certainly at conception the cerebral cortex is not formed at all and so it can not form concepts and so it is not human (remember I'm not saying it is not alive or that it is not potentially human, I am saying it is not NOW human). Somewhere in between lies that point where the cerebral cortex begins to function and so HUMAN life begins. I feel the supreme court made the best decision possible based on the available medical knowledge I know of. Six months or 24 weeks is likely a point beyond which HUMAN life may exist and so abortion should not be performed. Before 24 weeks abortion is not taking a HUMAN life and so should be allowed to be performed.

Thank you for this opportunity to express my ideas to you. I hope they are helpful in making your final decision.

Sincerely yours,

Peter C. LePort, M.D.
Assistant Professor of Surgery (7/1/81)
Downstate Medical College

1415 Benito Avenue
Burlingame, CA. 94010
April 24, 1981

1981 APR 27 AM 3 28

Senator Max Baucus
(of Montana)
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

Noting the newspaper report that you are concerned about the way the abortion questions are being handled by the Judiciary Subcommittee headed by Senator East, I am taking the liberty of sending you the enclosed copy of a letter that I had written to the local campus newspaper of the University of California Medical Center. You may find this brief analysis helpful in considerations about the question of the advent of human life in the fetus as looked at from a biomedical point of view.

If the Senate Committee is interested in pursuing this question in terms of when a brain with any semblance of human qualities appears in the fetus, it could obtain evidence on this question from those scientists who specialize in the study of fetal development of the nervous system. Although I am a professional neuroscientist, I am not a specialist in developmental neuroanatomy. However, I find the statement that "actual human life exists from conception" attributed to so-called scientists as if this was a scientifically established situation to be an appalling mis of scientific position in order to promote a personal bias or belief. The only objective evidence that we have firmly ties human personal existence to suitable function of the brain, and it seems to me that any non-religious argument must proceed in those terms.

With best wishes,

Sincerely,

Ben Libet

Benjamin Libet
Professor of Physiology
University of California School of
Medicine, San Francisco
(title used for purposes
of identification only)

BL:kk
enclosure

April 20, 1981

The Editor
Synapse
U.C.S.F.

Dear Sir,

I agree with Stephen Sladek that the definition of a human person is crucial to the issue of abortion (Synapse, April 16). Almost no one would want to kill a recognized human person; both the anti-abortionists and the pro-choice people are "pro-life" on that ground. Sladek claims he does not want a theological solution, so let's take a biomedical approach.

The criteria for human death may help us decide about the advent of human life. We now generally agree that appropriate functioning of the brain is the critical requirement for human existence. When the brain, particularly the forebrain portion, is judged to be irreversibly dead, we agree human life has ceased to exist, in both the meaningful and legal sense. Even though the heart, kidneys, muscles, sensory nerves, etc., are still functional, an individual with an irreversibly non-functional brain is properly regarded as no longer a live human person.

Since we accept the central requirement of a functioning brain that has at least some semblance of what we call human qualities, before admitting that a body can be a human person, we can apply this criterion to the case of the fetus. The precise criteria and time for the appearance of such a brain in the fetus does present difficulties. But there is no difficulty at all in setting certain minimum limits. For example, the zygote cell resulting from junction of the egg and sperm cells clearly has no brain at all. Yet many anti-abortionists insist this cell is already a human person. This is clearly based on a religious or metaphysical belief that a new human soul enters the fetus from the moment of conception. Anyone is entitled to hold such a belief; but insisting that everyone else must accept it is another matter, especially when it runs counter to what we have come to observe about the relation of the brain to human existence. The folk-wisdom that spoke of the pregnant woman "feeling life" within her when the fetus begins to move and kick may be closer to the mark.

Putting religious beliefs aside, the anti-abortionists are confusing the potentiality for human existence with an actually developed human existence. The zygote is certainly a potential human person. So are the egg and sperm cells, at a preceding step of potentiality; should we then regard all our egg and sperm cells as human beings?

The anti-abortionists have cleverly pre-empted the name "pro-life", even though we are all "pro-human life" but may differ with their definition and belief. Waving the banner of "pro-life" is supposed to confer a moral authority to their acts and make those who disagree with their beliefs appear to be murderers. Perhaps we should turn this around and apply more appropriate descriptions to the aggressive anti-abortionists. What shall we call people who, in the name of their own religious belief or emotional fixation, try - to force others to give up their right to make one of their most important personal decisions; - to force others to seek medically dangerous procedures by making abortions illegal; - to force others to complete the development of an unwanted fetus which may then become an unwanted child in circumstances that may be unfortunate for both the mother and the child?

Sincerely yours,

Benjamin Libet
Professor of Physiology

BL:kk

Hea
file S.158

1981 AUG 24 AM 10: 23

1415 Benito Avenue
Burlingame, CA. 94010

Senator Max Baucus
Senate Judiciary Subcommittee
on the Separation of Powers
Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus,

In connection with the hearings of this subcommittee regarding S. 158, the Human Life Amendment, I am enclosing a copy of a recent letter of mine published in the journal Science, the organ of the American Association for the Advancement of Science, in which I continue discussion of this issue as noted earlier in my letter to you this spring. I thank you for giving this your attention and hope it will be useful in your deliberations.

Sincerely,

B. Libet

Benjamin Libet
Professor of Physiology
University of California,
San Francisco, CA.
(Title used for purpose
of identification only)

BL:kk
enclosure

LETTERS

"Human Life" Testimony

. . . "When does human life begin?" like "When do you beat your wife?" is a double question that prejudices the reply. The secondary question, "When?" placed ahead of the primary question introduces the hidden assumption of a positive reply to the primary question. Moreover, the present tense implies that the activity occurs at present.

Consider an alternative supported by the experience that, unless ovum and spermatozoon are both alive and human when they meet, they will neither merge nor propagate human life—much less create it.

At present, human life does not begin. Life began in the very distant past and has continued to the present through a continuity of life cycles. By reproductive processes that are part of the life cycle, life is transmitted—not begun—through the production of new individuals. The continuity of life makes it nonsense to ask or say when life begins, but the production of new individuals permits identification of the step in the human life cycle after which a human individual or person exists. Since the second and not the first is the actual matter of the proposed legislation and is approachable logically, it deserves formal public statement.

An individual (Latin *in* = not, *dividuus* = divisible) is defined as an indivisible single entity. A person or human individual must, therefore, have the characteristic of indivisibility. An egg after fertilization is a zygote, a single cell that divides if development continues. Since not indivisible, a zygote cannot be considered an individual or person.

Confirmation is provided by the observation that each monozygotic twin is a whole individual and not the half individual (a self-contradictory term) that would be implied by a legislated assertion that a zygote is a person.

The division leading to twinning may begin as late as 16 days after fertilization, but even then no individual exists for there is a later major division, and it is characteristic not just of twins but all conceptuses that attain live birth. A conceptus, for which there is no layman's synonym, is a fertilized egg and everything that develops from it until it is born. A conceptus early develops two major components: embryoblast (most of which becomes fetus) and trophoblast (which becomes extraembryonic membranes, placenta, and umbilical cord). The fetus, by definition an unborn offspring, becomes a newborn or baby when it has come out of the mother; it becomes an individual when it has been divided from the trophoblastic part of the conceptus, usually by cutting the umbilical cord.

The trophoblastic parts of the conceptus are alive, are human, and the cells have the same genetic composition as the zygote, fetus, and baby. If any or all of these criteria were used to define personhood in constructing the argument for a legislated assertion that the zygote and its derivatives are a person, then the practice of cutting the cord, interrupting blood supply to the placenta, and letting the expelled placenta die would become murder in the eyes of the law. That seems inappropriate, yet if these normal aspects of birth management were specifically exempted, there would be formal recognition that the legislation rested on a logically unsound foundation.

In summary, if one accepts the definition of a person as a human individual, then careful reasoning and facts of nature compel the conclusion that a person exists after severance of the umbilical cord and not before.

BENT G. BOVING
C. S. Mott Center for Human Growth and Development, Wayne State University, 275 East Hancock, Detroit, Michigan 48201

With one geneticist (LeJeune) reported as stating that "human nature of the human being from conception . . . is plain experimental evidence" and another (Rosenberg) that he "know[s] of no scientific evidence which bears on the question of when 'actual human life' begins," perhaps it is time for a neuroscientist to enter the lists. I suggest that there can be objective, scientific criteria for setting at least certain minimum time requirements for fetal development to reach the beginnings of being a human person. Indeed, the well-known principle that ontogeny recapitulates phylogeny already suggests this.

The criteria for human death may help us in deciding on the advent of human life. We now generally agree that appropriate functioning of the brain is the critical requirement for human existence. When the brain, particularly the forebrain portion, is judged to be irreversibly dead, we agree human life has ceased to exist. Even though the heart, kidneys, muscles, sensory nerves, and so forth, are still functional, an individual with an irreversibly nonfunctional brain is properly regarded as no longer a live human person.

Since we accept the central requirement of a functioning brain that has at least some semblance of what we call human qualities, before admitting that even an otherwise live human body can be a human person we can apply this criterion to the case of the fetus. Admittedly, achieving agreement on the precise criteria and time for the appearance of such a brain in the fetus or even postnatally does present difficulties; the acquisition of the later morphological and physiological cerebral features regarded as human is not a sudden, all-or-none phenomenon. A decision on finally acceptable levels would therefore depend upon cultural and religious factors, as Rosenberg and others argue.

However, the setting of at least minimum limits presents no difficulties. For example, the zygote resulting from union of egg and sperm cells clearly has no brain at all. Therefore, one unassailable conclusion would be that the assignment of human existence to the zygote at conception must be regarded as one based upon a religious preference or a metaphysical belief (for example, that some human spirit enters the zygote), not upon any biologically tenable grounds. Furthermore, there are stages well beyond the zygote for which there can still be easy agreement on an absence of even the beginnings of specifically human-like functions or structures for the primitive brain.

Many antiabortionists confuse a *potentiality* for with an actually developed human existence. But the issue is presumably one of being "pro-life" for the recognizable human person, not for all biological organisms that could potentially become human persons. The human zygote is certainly a potential human being. So are the egg and sperm cells, albeit at a preceding step of potentiality. Indeed, given suitable technology, it is theoretically possible for many if not all cells in the adult human body each to be cloned into an entirely new human individual. Should we confer the status of human beings on each of these potentially capable cells or on some aggregate of them?

BENJAMIN LIBET
Department of Physiology, School of Medicine, University of California, San Francisco 94143

10 JULY, 1981

THE HAHNEMANN MEDICAL COLLEGE & HOSPITAL OF PHILADELPHIA
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OFFICE OF THE PRESIDENT AND CHIEF EXECUTIVE OFFICER

May 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of
Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your communication of May 13, 1981, the following is offered:

1. I do not believe that the question of human personhood is either a medical or scientific question.
2. I do believe that human personhood is a philosophical, moral, and ethical question.
3. I do not believe that medical and scientific data alone can determine the definition of human personhood.
4. There would be considerable impact upon the practice of medicine, genetic screening, and the use of contraceptives if S. 158 is enacted.

It is to be understood that these are personal perspectives and do not represent an institutional posture.

I appreciate the opportunity of forwarding these views.

Sincerely,

William Likoff, M.D.

WL:dms

CASE WESTERN RESERVE UNIVERSITY · CLEVELAND, OHIO 44106

School of Medicine
Department of Reproductive Biology
Brian Little, M.D., Director and Arthur H. Bill
Professor of Obstetrics and Gynecology

June 1, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C.

Dear Senator Baucus:

You have asked me, in my capacity as a medical expert, to respond to four specific questions in relation to Senate Bill 158.

In answer to your question as to whether human personhood is a medical and scientific question; my answer is no. In the first place, the definition of person in the Bill is extremely vague and relates primarily to that entity called "human life" which is even more vague. I am not sure that even in 1980, René Descartes, "cogito ergo sum" can be answered.

In response to your question as to whether human personhood is a moral, ethical, philosophical, religious or political question; my answer is similarly, it is neither one nor the other. Human personhood is such a broad definition that it could be included, in part, under any or all of the entities in this question as well as in the part on the medical and scientific question.

Therefore, in answer to question 3, do I believe that medical and scientific data alone can determine the definition of human personhood; my answer is of course no.

In the final question of what in my judgment would the impact of S158 be on medical practice, genetic screening, use of contraceptives, and others; this is an extraordinarily large question. Perhaps in no other area of medicine has the law imposed such constraints as in this area. The individual problems between a patient and his/her physician far exceed the imagination of the Senators in public forum. Whereas committees and laws can legislate broad constraints, the impact of this law would be an extremely narrow constraint on the activities in medical practice in this area. For example, genetic screening would be impossible, insofar as should abortion occur as

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a result of genetic screening, this would then become a criminal act. Certain contraceptives would not be able to be used, depending on the interpretation of the law, and of course this would be made in many different ways by many different judges. Perhaps the major inhibition of this law, should it be passed, would be on the research that goes into this area in order to examine the details of reproduction. The constraints already applied in this area have made research extraordinarily difficult to carry out. For this reason, scientists in other countries are ahead of our country in the study of some aspects of fertilization, implantation and reproduction.

I have no answers; I can only add to the questions. I practice medicine and I do science in this area, however, these questions are far more in the general field of the people than they are in the medical or scientific field, however, I do know that the results may have a profound influence on the patients I care for, particularly those who are unable to circumvent such restrictions. This, of course, reflects on primarily the medically indigent or the poor. This is not much help but that is as simple a view as I can make.

Yours sincerely,

Brian Little

Brian Little, M.D.

BL/pb

LOUISIANA STATE UNIVERSITY MEDICAL CENTER
School of Medicine
P.O. BOX 33932 · SHREVEPORT · LOUISIANA · 71130

Department of Pediatrics

May 28, 1981

Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation on Powers
United States Senate
Washington DC 20510

Dear Senator Baucus:

I have spent considerable time thinking about Senate Bill 158 since its introduction the early part of this year, and have recently read a report of a statement given by Dr. Leon Rosenberg, a Yale University geneticist. I must say that Dr. Rosenberg expresses,most elegantly, my own general thoughts. I believe that this is primarily because I, too, personally, favor individual choice whenever possible, but have not been actively engaged in the abortion controversy. To answer, specifically, your questions my own opinion is listed below.

1. I do not believe that the question of human personhood is either a medical or scientific question. This decision will not lend itself to critical analysis and accumulation of data.

2. The question of human personhood is certainly a moral, ethical, philosophical, and religious problem. I am not sure that the body politic is qualified to judge human personhood.

3. The answer here is a correlative of one. I do not believe, therefore, that medical and/or scientific data alone can determine the definition of human personhood.

4. S158 as now proposed will restrict the use of many presently employed means of contraception, notably the pill. Amniocentesis for diagnostic and therapeutic purposes would have no meaning and consequently would be little used.

I am appalled that Congress says that tax funds may not be used to support abortion for rape and incest. These are recognized legal indications for abortion in many states, and this decision is, therefore, saying that "such is restricted from poor women, but is not restricted from the person who can pay for it". I should rather have rendered by our society a decision whether we are opposed to abortion in all incidences or not.

I should like to close by quoting from Dr. Rosenberg's presentation. "If this matter is so compelling that our society cannot continue to accept a pluralistic view which makes women and couples responsible for their own reproductive decision, then I say pass a constitutional ammendment that bans abortion and overturns the Supreme Court decision in Rose vs. Wade, but don't ask medicine to help justify that course, because they cannot".

Sincerely yours,

Joseph A. Little

Joseph A. Little, M.D.
Professor of Pediatrics
Head of the Department

ab

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1981 APR 29 AM 9 14

April 24, 1981

Honorable Max Baucus
U. S. Senate
Washington, D.C. 20510

Dear Sir:

In response to your letter of 14 April, 1981, I would like to make the following observations:

1. I don't believe that the question of Human Personhood is a medical and scientific question in its entirety, especially in regards to conception being the beginning of a Human Being and legal Person.

2. The question of Human Personhood is a moral, ethical, philosophical and religious question. Politics should be left out of the discussion completely.

3. I agree that medical and scientific data alone cannot determine what the definition of Human Personhood should be in the present context.

If I can be of any further assistance to you, please do not hesitate to call.

Sincerely,

Ernest W. Lowe M.D.

Ernest W. Lowe, M.D.
Professor
Department of Obs/GYN
Boston University
School of Medicine

Childrens Memorial Hospital
44th & Dewey Avenue
Omaha Nebraska 68105
553 5400

April 24, 1981

1981 MAY -1 AM 10:29

Honorable Max Baucus
United States Senate
Washington, D.C.

Dear Senator Baucus:

Thank you for the opportunity to assist in the evaluation of S.158.

The question of human personhood in my opinion is in part a medical and scientific question and in part a moral, ethical, philosophical, religious and political one.

In the context of the bill the current medical and scientific data is not sufficient to determine the definition of human personhood in the present context. Actually, there would seem to be definite evidence that the definition of human personhood as beginning at conception is inadequate.

There is a class of pregnancies defined as hydatidiform moles. In the most extreme case, there is no fetus, cord, or amniotic membrane. This is very clearly a "product of conception," yet any arguments for personhood would be probably impossible to effectively defend from a scientific or medical point of view.

I hope the above is of help. If I can provide any additional information or be of further assistance, please let me know.

Sincerely yours,

Mark Lubinsky MD

Mark Lubinsky, M.D., F.A.A.P.
Director
Clinical Genetics Center

ML/kd

ADDENDUM: For the record, if it will be helpful, my credentials are: B.S. (Biology), City College of New York, 1968; M.S. (Genetics), University of Wisconsin, Madison, 1971; M.D., Downstate Medical Center, 1974; Pediatric Internship and Residency, University of Wisconsin, 1974-76; Fellowship, Clinical Genetics, University of Wisconsin, 1976-78; Director, Clinical Genetics Center, Omaha, Nebraska, 1978-present; Fellow, American Academy of Pediatrics, 1979; board-eligible, American Board of Medical Genetics.

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ADMINISTRATION
Ralph L Drake
Clinic Administrator
James B Turner
Assistant Administrator

April 27, 1981

The Honorable John East
Senate Office Building
Washington, D.C. 20510

Dear Senator East:

I would like to share my thoughts with you on the subject of abortion. I don't envy you and your subcommittee's grave responsibility in dealing with so emotional a matter.

Last year the American Academy of Pediatrics, of which I am a member, published a list of ten national health goals for children. The first one starts off "all children should be wanted. . ." Every week I see the tragedy of children who do not come into this world as the result of a committment by two thoughtful people who assume the responsibilities of parenthood. Instead, they are the end result of an unthinking folly, no doubt influenced by our society's saturation with the enticements of sexual activity.

No sensitive person is happy about the idea of abortion. I was sickened several years ago to receive advertisements through the mail from abortion clinics when the state of New York liberalized their restrictions. An abortion is an emotionally wrenching experience for everyone involved with it, but I feel very strongly that it is a lesser evil than continuing an unwanted pregnancy. I am sure that the Planned Parenthood forces would feel that their goal had been reached if they never had another accidental, unwanted pregnancy to be involved with.

Senator East, I have had an 11-year-old child come in my office, knocked up. That is crude language, but I think that describes her situation very well. By no stretch of the imagination could that pregnancy be considered the result of a committment by two thoughtful people to assume the responsibilities of parenthood. To sentence that child to continue her pregnancy would be cruelty beyond reason.

I have been involved with a family whose 2-year-old died from injuries inflicted by its mother in the name of discipline. I cannot believe that that child was conceived out of a committment to parenthood by two thoughtful people.

Page 2

I have given a lot of thought to this matter of pregnancy by choice. Children are my life's work, and I love them. Each one of them deserves to be wanted and cherished. All of us would agree that terminating an unwanted pregnancy is a poor second choice to preventing it in the first place. In my experience, though, it is unquestionably better than the alternative.

Thank you for considering these comments. My sincere best wishes to you and your subcommittee for wisdom, compassion, and judgement in your deliberations.

Sincerely,

R. T. Lucas, Jr., M.D.

RTLjr:cw

cc: Senator Baucus

The University of Vermont
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(802) 656-2150

1981 MAY 29 AM 10: 29

May 26, 1981

The Honorable Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

Recently, you solicited my opinions on S.158. This letter is written as an individual physician, and not in any official capacity.

In my opinion, the question of human personhood is not a medical or scientific question, but rather a religious or political one. I do not believe that medical or scientific data alone can determine what the definition of human personhood should be. I do believe that if S.158 were enacted and were held Constitutional, there would be a significant impact on the practice of medicine, particularly on genetic screening and on currently accepted contraceptive practices.

I hope these answers may be useful to you in your deliberations.

Sincerely,

William H Luginbuhl

William H. Luginbuhl, M.D.
Dean

WHL:mhg

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June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in reply to your questionnaire concerning S. 158.

1) No.

2) I think this is really an ethical, philosophical and religious question. It is not a political question.

3) No.

4) If enacted, S. 158 would have a tremendous impact on the practice of medicine. Children who are currently able to be picked up with illnesses prior to their birth that will lead to their demise within a matter of 1-2 years would be born and the cost alone of caring for these children would be astronomical. The cost seems little when compared to the suffering of the parents, relatives and physicians when we realize we are treating a hopeless condition.

As far as genetic screening is concerned, it would be of no value or of little value unless the parents opted not to have children if they knew they were carriers of certain genes or if they had a child with a known genetic disorder.

As far as the use of contraceptives, it would seem to me this would do away with the intrauterine device which is perhaps one of the most useful forms of contraception currently. It would also do away with any type of device that did not allow the fertilized ovum to implant.

Finally, I think that this is an ethical issue and one cannot legislate ethics without creating an underground to care for those people who feel ethically different.

I hope you find this information useful.

Sincerely,

John Mace, M.D.
Professor and Chairman
Department of Pediatrics
Loma Linda University School of Medicine

JM/tp

MICHIGAN STATE UNIVERSITY

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June 5, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United State Senate
Washington, DC 20510

Dear Senator Baucus:

I am very pleased to share with you my views on S. 158. Like, you I feel that this bill deals with a very sensitive area of human rights, and I have given considerable thought to the issues involved, since in my previous position as Associate Professor of Human Genetics at the Yale Medical School, I was directly concerned with these problems.

I am convinced that there is no scientific method of determining where or when "personhood" begins. The issue is not one which can be empirically resolved. For example, some would argue that the time at which a zygote can survive outside the uterus should determine the onset of "personhood." However, recent advances in technology have made it possible for fertilized eggs to survive for short periods outside the womb, and for earlier and earlier premature births to have a chance of surviving. Does this mean that the time of onset of "personhood" is a function of the technological state of society? I think not. Scientific "truths" are by their nature subject to revision and cannot form the basis for a moral judgment. Yet the question of the time at which a fetus becomes a person is quite clearly a moral one, not in part but in toto. In short, while the scientist or physician may have strong convictions about this issue, such convictions are based on his or her ethical values, not upon scientific evidence. Scientists therefore have no special insight into this problem.

The practical consequences of the passage into law of S. 158 would be devastating. It is not clear to me whether a physician could operate to relieve a tubal pregnancy under this definition of life, since it would be killing one human being to save another. Of course genetic screening would become irrelevant, except as a possible forewarning of a deformed or congenitally disabled child. Many couples heterozygotic for a genetic disease would be loathe to get pregnant since they would have a one in four chance of having a diseased child and would have no way to prevent such a birth even if genetic screening detected the problem in utero.

From the wording of the bill, it seems quite likely to me that IUD's and anti-implantation drugs would be outlawed as contraceptive devices, thus limiting the range of methods available for contraception. A further problem could arise if a woman disobeyed her physician's instructions during pregnancy and miscarried. Could she be prosecuted for negligent homicide or sued for damages on behalf of the fetus?

The Honorable Max Baucus
Page 2
June 5, 1981

In summary, my view is that S. 158 is a bill which attempts to legislate a moral and philosophical issue, that there is no way that a scientific decision about the time human life begins can be made, and that the results of passage of S. 158 into law would be grave infringement on the civil rights of the citizens of the USA as well as a serious setback in medical practice.

I appreciate the opportunity to express my views. If I can be of help in any further way, do not hesitate to contact me.

Yours,

P. T. Magee
Professor and Chairman

SP

cc: Senator Donald W. Reigle Jr.
Senator Carl Levin
Congressman James Dunn

The University of Florida College of Medicine
Department of Obstetrics and Gynecology

1853

GAINESVILLE, FLORIDA 32610
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May 29, 1981

Senator Max Baucus
Ranking Minority Member
Sub-Committee on Separation of Powers
U. S. Senate
Washington, D. C. 20510

Dear Senator Baucus:

Thank you for asking my opinion on Senate bill #158. I strongly believe that the question of human personhood is not a medical or scientific question but a moral, ethical, philosophical and/or religious question.

The passage of Senate bill #158 seems to have such far-reaching effects that it boggles the mind. Therefore, I think only after a long duration of study and consultation with people in philosophical and religious fields can any move like this be attempted. I do not think it should be decided on medical or scientific grounds.

Good luck, and I hope we have heard the last of it.

Sincerely yours,

CSMahan

Charles S. Mahan, M.D.
Professor
Director, Division of Ambulatory
Services for Women

CSM:eg

THE MILTON S. HERSHEY
MEDICAL CENTER

THE PENNSYLVANIA
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Department of Pediatrics/Division of Newborn Medicine

[illegible] JUN 14 [illegible]

June 10, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator:

Thank you for your letter of May 13 regarding Bill S.158. I find this bill and the concept that "human personhood" (in the sense of an actual human being or legal person) begins at conception is totally without merit from a moral, ethical, philosophical, biologic or scientific point of view and represents an intolerable intrusion into the lives of individual citizens.

From a purely biological standpoint there can be no question that the potential for life exists from the time of conception. On the other hand, the potential for human existence clearly does not exist until the fetus has developed to a point where it has the definite potential of developing into a human being as we understand the term. In my opinion this potential does not exist until the fetus has reached the 24th week of gestation. This is based on the fact that (as far as I am aware) no fetus whose gestation was less than 24 weeks has ever survived. Because a fetus of 23 weeks or less cannot survive, in spite of the most advanced technology currently available, such a fetus cannot be said to have either de facto or, indeed, potential for human existence. As I understand it, human existence involves the abilty to function independently as a human being; i.e., to exist outside the uterus. Until the fetus has passed 24 weeks of gestation it does not have that potential.

The question of human personhood, on the other hand, is a philosophical concept whereas the potential for human existence can be determined by medical and scientific data. New scientific data may, from time to time, require a revision of the time at which such potential can be said to exist. It is agreed by all experts in this field that, at our current state of knowledge, no fetus is capable of surviving before 24 weeks of gestation. Consistent with this the Supreme Court currently permits abortions to be performed before the 20th week of gestation.

If S.158 is enacted it will have far-reaching consequences which will be profoundly deleterious to the practice of medicine and, I believe, to the well-being of the society as a whole. For example, the act would require "due process of law" for any abortion to be performed. This would render all of the years of painstaking research and outstanding discoveries in the field of genetic screening completely nugatory. There are certain anomalies of the fetus which can be diagnosed with complete accuracy in utero. Some of these anomalies are incompatible with life. To force a woman, against her will, to carry such a fetus to term can only be classified as cruel, unusual and inhuman punishment.

The act would prevent the use of certain contraceptives whose action is to prevent implantation of the fertilized ovum. This would remove one of the ultimate freedoms of the individual in our current society -- the freedom to decide whether or not to bear a child. This type of intrusion is intolerable and, of course, as in many other instances will produce enormous hardship in that segment of society least able to bear its consequences -- the poor and the disadvantaged.

I have spent all of my professional life working towards the goal of saving human lives, and in particular, the lives of small, sick newborn infants. The ultimate goal, shared by all persons in this field of medical practice is to ensure the survival of a healthy and productive population who can serve society to the best of their ability. I see no moral, ethical or religious purpose in forcing individuals to have unwanted children or indeed to bear children known to be seriously defective. Society does not and will never undertake the care of such individuals, the provision of care falling, inevitably, to the parents and families concerned, frequently with disastrous consequences. I cannot believe that such situations can contribute to human happiness nor improve the moral, ethical or physical well-being of society as a whole.

If I can be of any further assistance (if you feel it appropriate) by providing testimony, I will be more than happy to assist in any way possible.

Yours sincerely,

M. J. Maisels

M. Jeffrey Maisels, M.D.
Professor
Chief, Division of Newborn Medicine

MJM/jlh

Enclosure

P.S. I enclose my curriculum vitae for your information.

An Equal Opportunity University

Mayo Clinic Rochester, Minnesota 55901 Telephone 507 284-2511

George D. Malkasian, Jr., M.D.
Obstetrics and Gynecology

May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I appreciate the opportunity to express my views regarding the bill S. 158. In regard to the following questions:

1. Do you believe that the question of human personhood is a medical and scientific question?

   At the present time, I do not believe that the question of human "personhood" is entirely a medical and scientific question. It involves moral, philosophical, ethical, and religious questions. Contrary to chapter 101, section 1 of the bill, there is no solid scientific evidence which indicates that "personhood" exists from conception.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious, or political question?

   I believe that the question of "personhood" involves all of the areas heretofore mentioned, medical, scientific, moral, ethical, philosophical, and religious. This question should be considered in those areas and not settled in the political arena by means of legislation. It has been proven over and over again that moral, ethical, philosophical, religious, and scientific matters cannot be legislated.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

   I do not believe that medical and scientific data alone can define human "personhood."

4. What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

   The impact of this legislation on medical practice would be as follows:

a. It would make illegal the use of intrauterine contraceptive devices and birth control pills.

b. It would put into legal hands rather than medical judgment the use of any drugs in pregnancy including those necessary to preserve the mother's life.

c. It would, by law, preserve a fetus with a known incapacitating condition.

d. It would not allow for medical care of spontaneous abortions until all evidence of pregnancy, including Beta subunit chorionic gonadotropin assay, was negative.

e. In cases of septic abortion, the law would indicate that the mother

   i. Could not receive drugs which would be life saving and

   ii. That contrary to accepted medical practice now this septic pregnancy could not be terminated.

f. A problem already recognized in all arenas, including the political one, is that of adolescent pregnancy and the withdrawal of contraceptives would certainly compound the problem.

g. Ectopic pregnancies are those that occur outside of the normal uterine cavity. It is known that tubal and ovarian pregnancies do not go to term and could be life endangering for the mother and and should be terminated when identified. This proposed law would negate care of the mother under these circumstances.

h. The law would negate doing amniocentesis for a known genetic problem such as Tay-Sachs, mongolism, etc.

i. The law would further negate the use of drugs and accepted medical procedures for the care of maternal disease in the second and final trimesters.

The legal problems raised by S. 158 would seem to fall into the following areas:

1. It would produce an involuntary servitude for the maternal host; i.e., it protects the "new person" at all costs to the mother.

2. It produces many legal questions regarding the use of not only drugs to preserve the mother's life but if, for example, at some future date a food substance was identified that caused congenital anomalies, the newborn could sue its mother for having used such a substance during pregnancy.

3. Similar legal problems are raised by the working environment of the mother or her choice of activities when pregnant.

4. If indeed "personhood" exists from the point of conception, the question of informed consent of the fetus is raised and at the moment there are no known answers to that.

Economic Impact - The problem of adolescent pregnancy has already been alluded to and the impact of this economically would be tremendous.

Social Impact - Again the problem of adolescent pregnancy would be compounded socially and the socioeconomic impact around the country as a whole would be significant.

The economic consideration of the fetal-maternal adversary relationship set up by this bill would be significant.

Finally, if the covert purpose of this bill is to prevent legal abortions then the bill should so state and address that problem. If the purpose of the bill is indeed to define "personhood" and it is the opinion of the political leaders that these things should be settled in the political arena, then I think all of the above problems should be addressed and specifically defined in the legislation.

Sincerely,

George D. Malkasian, Jr., M.D.
Professor-Chairman
Division of Obstetrics
and Medical Gynecology

GDM:js

American Genetic Association

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10[illegible]36 • (202) 659-2096

15 June 1981

The Honorable Max Baucus
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus:

I am writing to you as the Ranking Minority Member of the Subcommittee on Separation of Powers which has been holding hearings on Senate Bill 158. This Bill defines human beings as existing from the moment of conception. On careful reading and study of this Bill, I was struck by the theological manner in which it is written. It seems strange to me that the Congress of the United States should be concerned with such biological and theological questions as the status of the fertilized human egg. Yet the Bill is before your committee and I should like to provide my answers to some of the questions which you proposed in a recent letter to me. I also enclose a copy of my curriculum vitae, which may document both my interests and my qualifications for responding to your questions.

First, I realize that your Committee has received testimony to the effect that scientific data supports the proposition that human life in the sense of an actual human being or legal person begins at conception. There is no such scientific data, nor can there be. The decision as to when the developing human fetus achieves the status of a human being is a religious, social, or political decision, not a scientific decision. At the present time, we confer such status on individuals after they are born, and biologically separated from their mothers. Even so, the newborn baby lacks many of the human characteristics which are essential to full participation in human society. Children are not equal to adults in such matters as the consumption of alcohol, serving in the armed forces, voting, and so forth. Moreover, the acquisition of the essential characteristics to become an adult is a gradual process, and societies differ in the age at which adulthood is recognized. The same basic problems exist in regard to life before birth. Development is a continuous process and when to confer legal status as a person is necessarily an arbitrary social decision. In some primitive societies one does not achieve full status as a person until after puberty. I know of no society which confers such legal status on a fertilized egg.

The question of human personhood is not really a medical or scientific question, but science can say something about the acquisition of those biological properties that cause individuals to be considered as human beings. With modern scientific technology, we can keep an adult individual alive even when the brain has ceased to function, and can never function again. Such individuals are metabolically alive, but are scarcely persons in the legal sense. At the other end of the spectrum of development, at the fertilized egg, there are none of the biological qualifications for being a legal person. It is well to remember that most fertilized human eggs die in the oviduct or uterus and never develop to term.

It is most important to appreciate the fact that embryonic development is a process in which the essential characteristics of human beings develop gradually from an initial state in which they are not present at all. The fact that an egg has the potential of contributing to the development of a human being does not make the egg equivalent to a human being. Nearly everyting of importance is added after the egg is fertilized. The enlargement in mass from the egg to the newborn is more than a billion times, and the single egg cell gives rise to more than a trillion cells in the adult. Moreover, from the single egg cell perhaps as many as a thousand different kinds of cells develop - muscle, nerve, thyroid, sperm, etc. None of the distinctive constituents of these many cells is present in the egg. The organization of these cells into tissues and organs to produce the structures of human anatomy occurs gradually during many months of development. Only after these structures are present and functioning is there any adequate basis for recognizing a human being.

There is a distressing confusion of potentiality with actuality in much of the current discussion. With our modern scientific technology, it is possible in theory (and in practice with experimental animals) to dispense with fertilization altogether in the process of generating a new individual. Thus the sperm is not needed. By microsurgery on the fertilized egg it is possible to remove the genetic material introduced by the sperm or to replace all the genetic material of the egg with a transplanted nucleus. Moreover, the developing embryo can be separated into several cells, each of which will develop into a complete individual. So the potential is not to develop into just a single individual, but into several. Moreover, separate embryos can be aggregated together to make a single individual. Thus what was originally destined to be two or three or four individuals can now be made into a single individual. These laboratory manipulations, which are commonplace with experimental animals, serve to emphasize the fact that the fertilized egg is not equivalent to a single individual; the egg may develop into several individuals or become only a part of one. Likewise, there is no great significance in the initial genetic makeup of the fertilized egg, since that makeup can be altered or replaced through microsurgical intervention.

The question of when we, as social human beings, wish to accord the status of human being to a developing individual can be considered a philosophical or religious or political question, with moral and ethical overtones, but it is certainly not a scientific question. Those who assert that science supports the concept that the fertilized egg is a human being are misusing science in support of their own philosophical or theological views. No amount of medical or scientific data alone could ever precisely define the time at which a developing individual should be regarded as a human being.

I believe the primary deficiency in the current discussion of the issues of contraception and abortion as raised in Bill S 158 is the failure to realize the nature of embryological development. The term "human life" is often used, but that is very misleading. Life is a continuous process that has been going on for billions of years. It does not begin with a fertilized egg. The cellular antecedents of that egg were also alive. If the Congress fully appreciates the fact that nearly all human eggs, numbering nearly 7 million at the maximum during the embryonic life of the female, die and disintegrate, and that approximately two-thirds of the eggs that are fertilized never develop to term, then surely eggs and human beings will not be equated. Moreover, I hope that Congress considers the fact that embryonic development can be easily modified by current scientific technology: by enucleation, by nuclear transplantation, by activating eggs to develop without being fertilized, by aggregating several embryos into one, by making several embryos out of one, and by numerous other procedures. We know that the physical structures required for the expression of the characteristics of a human being do not exist in early states of development and only gradually develop to the point where life can be maintained independent of the mother.

As a biologist, I cannot improve upon the verdict of the Supreme Court, when it drew the boundary between a fetus and a human being at the time when the developing individual achieves biological independence from the mother. That decision in Rowe vs. Wade made in 1973 represents, in my view, the deepest understanding of which our society is currently capable in drawing a line through a continuous process of human development at that point at which a human being has been formed -- that is, at birth.

Yours sincerely,

Clement L Markert

Clement L. Markert
Henry Ford II Professor
of Biology at Yale University

CLM:rc
Enclosure

UNIVERSITY of PENNSYLVANIA

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WOMAN'S HOSPITAL DIVISION
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Department of Obstetrics and Gynecology

LUIGI MASTROIANNI, JR., M.D.
William Goodell Professor and Chairman

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Unites States Senate
Washington, DC 20510

Dear Senator Baucus:

I have reviewed bill S158 designed "to provide that human life shall be deemed to exist from conception." I recognize that the bill has engendered substantial public debate, and that scientists and physicians are being asked essentially to define the onset of human life. Theologians and philosophers have grappled with this issue over the centuries and even within my own religion, there has been variation of opinion over the years as to exactly when in pregnancy, meaningful human life begins. I am a Roman Catholic and well recognize that the official position of the Church on this matter has been altered as scientific information has become available. As you no doubt know, the present view of the Roman Catholic church is in general that life begins with conception, but I am sure there are those of other persuasions who would disagree. The problem we have then is to define conception in scientific terms. Before I comment on that issue, I should make the point that we are dealing with a metaphysical issue and not a scientific one. It is my view that in our pluralistic society in the United States, it is inappropriate to define in law a position which would then have to be embraced by all of our citizens, the violation of which would put those whose beliefs are contrary to those expressed in the law in jeopardy. As a citizen who feels that our society has been served well by our traditional separation of church and state, I would not wish to see a law enacted which would impose my own religious and moral views on others who are not of my persuasion. I would surely run the risk that at some point others might wish to impose their views on me. In the history of the Church there are numerous examples of those with firm beliefs who were martyred by others who objected to the principles they espoused.

Moral and litigious issues aside, let us consider the scientific information pertinent to any discussion of when life begins. In the early church, because the process of fertilization and early development was not appreciated, a position was held that life actually began with the movement of the fetus within the uterus or "quickening." When it was appreciated that pregnancy occurred as the result of union of sperm and egg, many then defined the beginning of life as representing that event. As the physiology of the fertilization process is scrutinized in greater detail however, it becomes evident that at the scientific level the issue is not quite so simple.

Spermatozoa are living cells. They present evidence that they are actually living by their motility. They are equipped with a very effective mechanism for movement in the form of a tail which beats under the control of cytoplasm droplets within the head whose motion is also influenced by other factors not yet understood. This living cell which has been manufactured in the testes is released into the environment provided by the male reproductive tract. It is not yet capable of fertilization, and it must first come under the influence of the male reproductive tract where it acquires an additional ability to function in the fertilization process. Even after it is released from the male reproductive tract during ejaculation, it is still incapable of penetrating the egg, and it is modified further after exposure to the female reproductive tract taking on additional ability or capacity to fertilize. I don't believe there is any theologian who would deny that the spermatozoan is human from the very point when it is manufactured and that it is living. The decision then, must be made as to whether the spermatozoan itself, being living and human, and having the potential for continued life once fertilization has occurred, albeit in another form, is entitled to the right of protection as a person. Those who would deny this right to the spermatozoan might argue that it is not a complete human cell chromosomally. It contains only the haploid or half of the number of chromosomes which are finally present in the embryo. Paradoxically, those who would take that position would, undoubtedly insist that an individual born with fewer or more chromosomes than normal is human and entitled to all the rights of "personhood." The decision to base the definition of "human life" solely on the number of chromosomes in a given cell has far reaching implications. This rather absurd example of an effort to apply scientific fact to a metaphysical definition can easily be highlighted as we take the argument further.

This living human structure, the spermatozoan, possibly not completely human because it does not have a complete complement of chromosomes, becomes more human as it takes on the ability to fertilize under the influence of the female reproductive tract. It undergoes certain biochemical and morphological changes which are still not completely understood, which condition it further so that it can finally enter the egg. The process of fertilization, actually began with conditioning of the spermatozoan in the male and female reproductive tracts. Thereafter, fertilization involves not only the egg itself, but the various investments which surround the egg at the time it is released from the follicle in the ovary. The sequence of events which occur during penetration are not completely understood, although the process has been studied extensively in experimental animals using *in vitro* fertilization. Suffice it to say, that the spermatozoan must penetrate a cellular coat which surrounds the egg, must find its way to and attach itself to the zona pellucida, a protein layer which immediately surrounds the cytoplasm of the egg. The penetrating spermatozoan must have been conditioned further such that it can traverse the zona pellucida, must then attach itself to the egg membrane or the cell wall and finally penetrate into the egg cytoplasm. It is then modified further to form a pronucleus. Thereafter, the male pronucleus and the female pronucleus, also formed at about the same time, join and at some point thereafter, there is division of this egg to the two-cell stage. If we are to ask scientists when during this process human "personhood" is assured, those who are unfamiliar with the details of the events as presently known might easily provide a glib answer - something to the effect that when egg and sperm "meet," this union represents the beginning of a new and sacred life. Definitions are not so easy, however, for those of us who have studied the details of the process. If we take the position that it is the completion of the fertilization process which is important, there are those who could equally take the position that it is the *potential* for completion of the fertilization process which is important. The latter position, vis-a-vis fertilization, would be similar to the position of those who state that the recently fertilized egg represents the beginning of human personhood because it has the *potential* of proceeding on through further development in the oviduct and uterus. The fallacy here is that a high percentage of oocytes which have been penetrated never proceed on to further development, and that many oocytes which do are thwarted so early in their development that their presence is not even recognized in the form of a skipped menstrual period.

Must we, then, as scientists give you, as legislators, a clear cut definition on the beginning of life based on our knowledge of fertilization? The state of the art will not allow such a statement when the process is still completely understood. The National Institute of Child Health and Human Development recently sponsored a conference on *in vitro* fertilization, and the debate and discussion of that meeting occupies a full volume. I am sorry to report that for many facets of the fertilization process, there is no consensus as to exactly how it occurs. I doubt seriously that any scientist with genuine expertise in this field would be able to label one event or another in this complicated chain of events leading to early development as the pivotal one on which you could base a decision on exactly when "human life" begins.

This inability on the part of the scientific community to define precisely the onset of life in biological terms will create a vast number of legal issues if bill S158 is enacted. These will revolve about the appropriateness of various contraceptive measures. A rigid position on the beginning of life based even on present scientific knowledge in the fertilization field could eventually allow one to apply this law to proscribe many commonly used contraceptive measures. For example, one could readily make a case for banning the use of the intrauterine devise (IUD) which is associated with occasional penetration of an egg, but the problem is compounded further in that we do not really know in how many instances an actual fertilization is completed in the presence of an IUD, nor can we say in how many cycles fertilization is even initiated. Some of the low dose oral contraceptives do not uniformly inhibit ovulation, and may occasionally prevent pregnancy by modifying the endometrium or uterine lining. These mechanisms of action cannot always be defined. Yet, scientists will be asked to testify on these issues, and legislators will be asked to base decisions on incomplete or speculative information.

Many of the scientists who have testified that human life exists from conception are not working actively in the fertilization field, and hence do not have the expertise or detailed information which would allow them to appreciate the complexity of this process. Hence, their statements were based on opinion out of a sense of religious or moral persuasion and not fact. I know of no well grounded expert in the fertilization field who would be willing to define the exact moment in this complicated early developmental process at which further development is assured. Hence, in my judgment it is thoroughly inappropriate to ask the scientific community to assist congress in a definition of "human personhood." The definition is a theological one and clearly not a scientific one at all.

Sincerely yours,

L. Mastroianni

Luigi Mastroianni, Jr., M.D.

LM:gc

SCHOOL OF MEDICINE
OFFICE OF THE DEAN
(213) 224-7001

June 8, 1981

The Honorable Max Baucus
Senator, State of Montana
1107 Dirksen Senate Office Building
Washington, D. C.

Dear Senator Baucus:

Thank you for sending me a copy of Mr. Helms S. 158. The questions you raise are difficult to answer. In your letter you state that you are writing to me as a medical expert and I shall answer your questions from that position. The goal of ethical physicians is to nurture life and to produce, or restore, quality of life. In that spirit, I view human personhood as a scientific, moral, ethical, and philosophical issue. I do not view it as a political issue. Certain faiths have made it a religious issue and I don't think my judgment will change that.

I view S. 158 as a bill with tragic implications. Medicine has made vast strides in determining whether or not a fetus is sound through genetic screening, amniocentesis procedures, etc. It is my view, as a physician, that parents anticipate a sound child who can be responsive to training and has a reasonable chance of growing to healthy adulthood. If this expectation clearly cannot be met, I believe it better to terminate the pregnancy and try again. There was a time in the history of man when one did not have this choice; today, when such an informed choice is viable, parents do not have to be "doomed" or "sentenced" to the emotional and physical strain and the financial burden of raising a child who is unable to function.

I noted with interest the introduction of S.1090 which seeks to deal with some of the problems of adolescent pregnancy--yet even abortion research would be restricted under the bill. Under S. 158, it appears that Senator Helms would restrict the right of every citizen to choose abortion whether that choice is financed with public funds or not. While I believe that those individuals who hold this tenet as a result of their religious beliefs should have the right to choose whether or not pregnancy should be terminated in their own living situation, I do not believe that religious and political beliefs on this issue should be forced on others. Clearly, if enacted, individuals seeking termination of pregnancy would be forced to use less than optimal medical facilities.

In summary, scientific advances have allowed us to make diagnoses of intrauterine conceptuses which do not have sufficient qualities to live independently as "human beings". Should we deny these scientific advances? I subscribe to the position that life should include "quality of life" and therefore I cannot support this or similar legislation.

Sincerely,

Allen W. Mathies, Jr., M.D.
Dean, School of Medicine

AWM:lb

Baylor College of Medicine
DEPARTMENT OF CELL BIOLOGY • 713 790 4930

June 8, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the copy of S. 158 and your interest in obtaining recommendations from the scientific community. First of all I do not believe that the question of human personhood is a medical and scientific question. In fact, I think that the passage of S. 158 would deliver a death blow to scientific investigations both medical and basic. We are already having difficulties in continuing funding for some of the more important programs that have been previously funded through our National Institutes of Health. Medical and scientific data alone can certainly not determine the definition of human personhood and should not even be considered. Whether the question of human person is in part moral, ethical, philosophical, religious or political questions remain to be answered by people who are experts in these fields. From my viewpoint and from the viewpoints of my colleagues I would urge you to do everything you can to table S. 158 in subcommittee and never allow it to reach vote to the full Senate.

Thank you very much for your willingness to seek outside information concerning this bill. It has been my pleasure to deliver you what I consider to be a sound answer.

Sincerely yours,

Anthony R. Means, Ph.D.
Professor and Vice-Chairman

ARM:gal

TEXAS MEDICAL CENTER • HOUSTON, TEXAS 77030

HARVARD MEDICAL SCHOOL — MASSACHUSETTS GENERAL HOSPITAL

DONALD N. MEDEARIS, JR., M.D.
Charles Wilder Professor of Pediatrics

CHIEF CHILDREN'S SERVICE
Burnham Division for Children
Massachusetts General Hospital
Fruit Street, Boston 02114
Area Code 617
726-2901

July 8, 1981

The Honorable Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I apologize for my belated reply to your request for my opinion about Bill S.158 which is "to provide that human life shall be deemed to exist from conception."

I urge you to vote against this Bill.

To define human life is extremely difficult, witness the fact that neither physicians, philosophers nor the clergy have been able to define it with ease or unanimity. Medical knowledge does not provide a basis for defining when human life begins.

The passage of this Bill would effectively deny to women the right to choice; I believe that this would be wrong, and a great disservice to women.

Therefore, I urge you to vote against the Bill.

Thank you for giving me the opportunity to express my views.

Sincerely yours,

Donald N. Medearis, Jr., M.D.

DNMjr:ld

Cook County Hospital
1835 W. Harrison St., Chicago, Illinois 60612 Telephone 312/633 6000

June 12, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you very much for the letter of May 13th that just arrived to my hands today, since it was sent to an old address of the Chicago Medical School.

Regarding the four questions:

(1) I do believe that human personhood is a medical and scientific question.

(2) I also believe that human personhood is an ethical, physiological, and consequently, political issue.

(3) In this context I believe that medical and scientific data should be taken into consideration when defining human personhood, but also other criteria are to be put together to raise a proper definition. Summarizing my personal position, I believe that the difficulty lies in where we all agree in that a newborn is a human being and consequently, we should accept that a few minutes before being delivered, being the same individual, it should also be considered a human being. If this ratiionale is valid, time is not the essential criteria since minutes, hours, days, weeks, months and trimesters are just aspects of the same life and I do not see why what is valid at the end of a pregnancy is not valid from its very beginning.

(4) Although, it is very difficult to make predictions nowadays, if S158 is enacted obviously the use of contraceptives will be expanded. Regarding genetic screening, the issue is whether a genetically defective embryo has the full potential of a normal human being. Since the answer is perhaps no, I would predict that abortion for genetical reasons will remain legal.

I hope I have contributed with my answers with the best of my knowledge and beliefs. Should I be needed for any further help, do not hesitate in contacting me.

Most sincerely,

Carlos Mendez-Bauer, M.D.
Professor
Chairman Division
Perinatal Research and
Intensive Care Unit

MB/kc

P.S. In the future please send all correspondence to:

Cook County Hospital
Department of Obstetrics and Gynecology
1825 West Harrison Street
Chicago, Illinois 60612

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SCHOOL OF MEDICINE AND DENTISTRY · SCHOOL OF NURSING
STRONG MEMORIAL HOSPITAL

DEPARTMENT OF PEDIATRICS
Box 651

June 11, 1981

Senator Max Baucus
Ranking Minority Member
The Committee on the Separation
of Powers
The United States Senate
Washington, DC 20510

Dear Senator Baucus:

Currently the United States Senate is engaged in deliberations on Senate in S.158 seeking to define when human life begins. As the Supreme Court of the United States deemed itself unable to define when human life begins, it is proper that the legislative branch of government attempt to define, for purposes of social custom and law, this critical period in the human life cycle.

As a practitioner of the medical subspecialty of Neonatology (the care of the newborn child), the limits of the successful application of current technology to the human infant of 24 weeks gestation and below are both frustrating and disappointing. It is, however, obvious that the human fetus is both alive in terms of vital function and his ability to respond to numerous internal and external stimuli from very early in human gestation. Unfortunately, in many instances, I am called to provide what little care is available to the human infant delivered prior to 24 weeks gestation. If the dramatic strides in neonatal care of the last decade continue, we will significantly lower the age of human infant survivability and infant well-being. Unfortunately the vast majority of these infants die in 1981. To deny sanctity and a thoughtful and compassionate approach to the mother and father of these infants, and to discard these immature newborns as neither being alive nor within due process of both law and humanity is unconscionable. Certainly, the mother and father of these infants recognize a tremendous loss when their infants have died. It, therefore, seems inconsistent to be able to die with such profound effects on parents and to never have lived as proposed by some witnesses testifying before your committee.

Senator Max Baucus
page 2

Because of the above, and because of the requirement for due protection under the constitution for all persons, I respectfully request that you consider favorably S.158 and provide for the constitutional protection of human infants regardless of their age at birth. Current technological advances hopefully will enable the salvage of many more infants that, in 1981, serve to frustrate physicians and cause sorrow for us all.

Respectfully yours,

T. Allen Merritt

T. Allen Merritt, M.D.
Assistant Professor of Pediatrics
Obstetrics and Gynecology

TAM:nj

College of Physicians & Surgeons of Columbia University | *New York, N.Y. 10032*
DEPARTMENT OF HUMAN GENETICS AND DEVELOPMENT
701 West 168th Street

1981 APR 28 AM 10 50

April 24, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am responding to your letter as a medical and scientific expert. My training has been both in obstetrics and gynecology and in genetics. My major area of expertise is cytogenetics, in which I have done research for twenty-two years. My first publication dealing with chromosome abnormalities, in a patient with Klinefelter syndrome (XXY) and Mongolism (Down Syndrome; trisomy-21) appeared in 1959, just a few months after Jerome Lejeune's classic first report of a human chromosome abnormality. I continue to deal with such problems, being involved in genetic counseling and prenatal diagnosis of genetic and chromosome disorders.

I believe that the question of human personhood has medical, scientific, moral, ethical, philosophical, religious and political dimensions. Medical and scientific data alone cannot determine what the definition of human personhood should be, although a useful definition must take medical and scientific information into account. In my view, the human embryo or fetus is a potential person, but must be born and live outside the mother's body to become an actual person.

It is incorrect to say that a human being exists at conception. Following conception, many fertilized eggs (perhaps a third) do not have the potential to develop into a human being because of a genetic or other defect so severe that implantation in the uterus never occurs. In other cases (about one in seven) implantation does occur, but only a placenta (but no embryo) develops, or the embryo that is formed cannot survive the first few months of pregnancy, and miscarriage (spontaneous or missed abortion) occurs. Other embryos do not die so early but still lack the potential to become a normal human being.

In some pregnancies, advances in medical science now make it possible to predict, usually by the 19th or 20th week of pregnancy, that a particular fetus does not have the potential to become a normal human being but is doomed to die later in pregnancy, (a stillbirth), soon after birth (e.g. an anencephalic) or somewhat later (e.g. a child with Tay Sachs disease), or else will manifest moderate or profound mental retardation or other serious defect. Many couples, given this information and the choice, elect to terminate such a pregnancy. I share their view of parental responsibility. As scientific understanding increases in this relatively new area of research, I expect that alternatives to abortion will be developed to prevent at least some of these types of problems.

Sincerely,

Orlando J. Miller, M.D.
Professor of Human Genetics and
Development and Obstetrics and
Gynecology

OJM/hb

TUFTS UNIVERSITY
SCHOOL OF MEDICINE

DEPARTMENT OF
OBSTETRICS AND GYNECOLOGY

171 HARRISON AVENUE
BOSTON, MASSACHUSETTS, 02111

June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I would answer the questions contained in your letter of May 13, 1981 as follows:

1. Do you believe that the question of human personhood is a medical and scientific question? My answer to this question is no.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? Yes.

3. Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? My answer to this is no.

4. What, in your judgment, would be the impact if S. 158 is enacted? a.) On the practice of medicine, I believe that S. 158 would have a definitely detrimental effect on medical practice and the health of our patients. b.) On genetic screening, I believe that S. 158 would make the tremendous advances in genetic screening which have occurred in recent years useless, and would result in the birth of many individuals to a life of extreme suffering. c.) On the use of contraceptives, I believe that S. 158 would serve to outlaw several safe and effective contraceptive techniques.

In summary, it is clear that S. 158 is intended to deprive women of their rights as individuals, and to deprive the doctors for women of some of the means of assuring women's physical and emotional well-being. There are no new scientific data to affirm or deny that personhood begins at any time prior to the birth of an individual. I feel very strongly that the passage of this bill would be a blow to freedom.

Sincerely,

George W. Mitchell, Jr., M.D.
Professor and Chairman

GWM:go

School of Public Health
UNIVERSITY OF ILLINOIS AT THE MEDICAL CENTER, CHICAGO
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Mailing Address: P.O. Box 6998 · Chicago, Illinois 60680

June 5, 1981

Senator Max Baucus
U.S. Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing you with regard to S.158. I do believe that the question of human personhood is a medical and scientific question. But in my view the question of human personhood is also in part a moral, ethical, philosophical, religious and political question. I therefore do not believe that medical and scientific data alone can determine what the definition of human personhood should be.

If S.158 is enacted, I believe that the impact will be disastrous. Not only will women lose more control than even the little they have exercised over their own bodies, but also physicians will be handicapped in the exercise of their judgement as to what would be in the best medical interest of their patients. It will become impossible to perform genetic screening even for the purpose of reassuring parents concerning the normality of their offspring since amniocentesis is associated with a degree of risk to the fetus. Obviously abortion even of a severely defective fetus will be illegal, and tragic examples of wrongful life, some of whom may even sue their parents for their living pain, may survive to live bitter and difficult dependent lives. Contraceptives whose action potentially occurs following fertilization of the egg will be proscribed although the proportion of fertilized eggs which implant successfully and are not aborted spontaneously by six weeks following the onset of the last menstrual period is probably less than 50%. The assumption that every fertilized egg represents a human being fated to survive is an inaccurate assumption. Even a high percentage of implanted embryos spontaneously and without recognition abort.

For your interest I enclose a clipping from the Chicago Tribune of June 2, 1981. This may be the forerunner of other legal actions based on what in my judgement is an ill-considered definition of human personhood. I hope that S.158 will not succeed.

Sincerely,

Naomi M. Morris

Naomi M. Morris, M.D.,MPH
Professor and Director
Community Health Sciences
and Professor of Pediatrics
Abraham Lincoln School of Medicine

NMM/mb

CHILDREN'S HOSPITAL

Grant Morrow, III, M.D.
Medical Director

Professor and Chairman
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Columbus, Ohio 43205
Telephone (614) 461-2090

June 4, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13, 1981 which I received on June 1, 1981 regarding Senate Bill #158. As a biochemical geneticist and a person involved in the day-to-day management of individuals with difficult genetic disorders, I feel I am qualified to comment on the questions listed in your letter. To pinpoint when human personhood begins is a philosophical and religious issue and has very little, if anything, to do with medical or scientific data. Unfortunately in the senate hearings, many well-intentioned scientists have thrust their over-zealous opinions on the committee as if their conclusions were based on scientific fact. As. Dr. Leon Rosenberg stated, there are no scientific or medical data to answer the question of when human personhood begins.

In my judgment, if Senate Bill #158 is enacted, it will be an intrusion upon the rights of all women to have some control over their own bodies and their destiny.

My feeling is that this is an individual and couple decision regarding how a particular pregnancy is managed. Senate Bill #158 would probably have a very negative effect on the genetic screening programs that are now going on and would unfortunately prevent the economically disadvantaged person from having the opportunity to have the same medical care that a person of greater means would have; i.e., termination of a particular pregnancy. It is unfortunate that moral issues have been construed to be scientific dogma.

I hope this letter will answer the questions you raised.

Sincerely,

Grant Morrow

Grant Morrow, III, M.D.

GM/dt

SIU
Southern Illinois University
School of Medicine
P.O. Box 3926
Springfield, Illinois 62708

Office of the Dean and Provost
801 North Rutledge Street

May 27, 1981

The Honorable Max Baucus
Minority Leader, Subcommittee on
Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to respond to the questions you pose. I cannot agree with the proposed statement in S. 158 that "scientific evidence indicates a significant likelihood that actual human life exists from conception." That cells or collections of cells may be alive or dead is subject to scientific proof. When the products of conception actually become, in fact, a human being with constitutional rights is not in my judgment amenable to scientific definition with the knowledge we have at hand. Having struggled with this question personally and also in discussion with others, I find that no meaningful statement can be given without recourse to a moral or religious framework for making personal or professional decisions. Accordingly, I do not feel that this definition should be subject to legislation but rather that personal choice and conviction should be respected and protected within the proper bounds of religious and ethical freedom given to our citizens.

Sincerely,

Richard H. Moy, M.D.
Dean and Provost

UNIVERSITY OF MIAMI
MIAMI, FLORIDA 33101

DEPARTMENT OF MEDICINE (R-99)
SCHOOL OF MEDICINE
P.O. BOX 016960

May 28, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your request I am pleased to have this opportunity to express my views on the complex issues raised by S.158. Let me begin with replies to your specific questions:

1. I do not believe that the question of human personhood is wholly a medical and scientific matter, although, of course, human personhood has a biological foundation.

2. I do believe that the question of human personhood is in part a moral, ethical, philosophical, religious, and/or political matter.

3. I do not believe that medical and scientific data alone can determine what the legal definition of human personhood should be.

4. In my judgment enactment of S.158 would have a significantly negative impact on the provision of medical care, on the practice of genetic screening, and on the survival of individual responsibility and freedom in personal decisions regarding reproduction. Specifically (but not all inclusively) enactment of S.158 would impede and impair optimal obstetrical care, would abolish all genetic screening programs regardless of merit or popular support, and would illegalize the use of contraceptives that interfere with implantation of the conceptus. I believe that inactment of S.158 is contrary to the best interests of the American public and would constitute intrusion of government into decision areas best left to the individual.

In my view the crux of the conflict in debate over S.158 lies in the confusion of biological and legal definitions of human life. Biological human life begins at conception. Conception provides the genetic definition of a person, all subsequent events such as implantation, completion of organogenesis, initiation of heartbeat, achievement of viability, and birth being time-variable markers on a continuum. The legal definition of a person must begin at some point in this continuum and is not determined or determinable by scientific experiment or observation. To concede the uniqueness of conception as a biological and genetic event is not to concede that the conceptus is a person in the sense implicit in the 14th ammendment to the Constitution of the United States.

Those who believe that a newborn infant is, and that a conceptus is not a legal human personhood, are then faced with the dilemma of determining when legal human personhood begins in a continuum of events occurring at varying times for each individual. I repeat for emphasis that science cannot alone determine this point. This is the province of law, and solution will involve compromise and practicality.

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Senator Max Baucus
May 28, 1981
Page Two

I should like to suggest that the point of individual viability be taken as the point of individual legal personhood. By viability I mean biological viability with all of the support that can be provided by society. (Even a newborn infant is not viable without care.) Because of the variability of this point, the legal definition could be set at the lowest age at which any fetus has ever survived outside of the mother's uterus. This time point would have to be reset to accomodate the advances in neonatology that continuously lower the age of viability. The time point would represent not a scientific absolute but a practicable compromise. Such compromises are the essence of legal solutions to human disputes which require settlement in the face of inadequate and perhaps unobtainable knowledge.

I hope that these ideas will aid you in your difficult task of evaluating S.158, and I shall be pleased to be of any further assistance.

Sincerely yours,

Karl H. Muench /wB.

Karl H. Muench, M.D.
Professor of Medicine and of
Biochemistry
Chief, Division of Genetic Medicine

(Typed from Dr. Muench's
handwritten original and
sent in his absence.)

KHM/wrb

THE JOHNS HOPKINS HOSPITAL
BALTIMORE, MARYLAND 21205

June 2, 1981

DIVISION OF MEDICAL GENETICS
DEPARTMENT OF MEDICINE
JOHNS HOPKINS UNIVERSITY SCHOOL OF MEDICINE

THE JOSEPH EARLE MOORE CLINIC
TEL.: 301 955-3122

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Thank you for your letter of May 13th, 1981. I have given considerable thought to my reply. I have decided to answer it as a physician and geneticist with a fairly serious de facto interest in medical philosophy and who has given much time to analyzing the problems treated in S 158. I do not present myself as a mouthpiece for the medical profession.

In answer to your four questions, I have the following comments.

Question 1. Neither the nature of personhood nor the appropriate means of investigating it seem to me questions that in any useful sense can be called "scientific." (I recognize, however, that many people use the word "scientific" as more or less interchangeable with "scholarly.") Whether they are medical, is hard to say, because the scholarly scope of medicine is poorly defined. The ideal physician would address all the relevant facts and arguments; but in reality few physicians are equipped, or disposed, to do so.

I would rather address the question of what the ideal sources of evidence pertinent to the physician's decision may be. In the scientific sphere they would certainly include the following.

(a) Some aspects of physics and chemistry, since evidently without them nothing resembling human life seems to exist.

(b) Certain biological facts, notably the basic genetic mechanisms. In the present state of our knowledge it appears that all the genetic endowment of the individual are firmly formed, present, and uniquely determined at conception.

(c) Certain medical statistics. These are not of irreproachable quality, but the orders of magnitude that I shall quote are reasonably accurate. The chances of a person ultimately resulting are somewhat as follows:

From any sperm taken at random	1 in a hundred billion.
From any ovulated ovum	1 in 250
From any fertilized ovum	1 in 2
From any pregnancy that has reached the end of the third month of pregancy	4 in 5.
From birth	Over 95%.

(d) Certain psychiatric and psychological evidence on what constitutes sentience.

Comment. Both arguments from critical changes in probability and the existence of unambiguous and essential physico-chemical structures associated with human personality, suggest conception as the most promising critical point between non-personhood and personhood. Beyond this stage, the evolution of the pregnancy may fail for two reasons. The endowment of the fertilized ovum is so defective as not to lead to a person. (For instance one kind of defective fertilization, the so-clled hydatidiform mole, leads to a disordered mass of cells that behaves as a benign tumor and which nobody, I am sure, would regard as a potential or actual human being. But such clean-cut instances are rare and help us little in the general case.) Alternatively, some extraneous accident leads to destruction.

I have more than a suspicion that probabilistic arguments do not sit well with the law. But those of us in medicine have learnt to live with them. It is a common, but unwarranted, supposition that the physician can produce out of thin air arguments of a more definite form.

Question 2. Unquestionably. But while I do not agree that mere empirical fact can furnish the values (without which it is now almost impossible to propose any policy or enact any law), nevertheless, no sound opinion is admissable which is flatly at variance with the facts. If there is any suggestion that the disciplines listed (as distinct from particular opinions expressed by experts in these fields) are of their nature in conflict with medical opinion, I must protest at a false dichotomy. For a complete physician who is not idiot savant has in fact private moral, ethical, philosophical, religious and political views.

Question 3. Again I suspect this is a false contraposition. I know what I would mean by "scientific data" but I am not at all sure what is meant by "medical data." Part of medical data (by no means all of which is, or should be, scientific) includes the parents' perception of values; issues of guilt and moral standards; the nature of normality (an extraordinarily elusive topic on which I have written extensively); problems of independence and confidentiality; and much more of the same. My problem is that because of the evasiveness that underlies the whole existent philosophy of medicine, it is very difficult to decide what (if anything) we should exclude from the realm of "medical data" that might be pertinent to the issue.

If the burden of the question is whether the empirical and value-free data of medicine is sufficient, the answer is no.

Question 4. There are several component questions here.

(a) The practice of medicine would in one major way be made much easier. To my mind the Roe vs. Wade decision was (regardless of whether the decision was correct) a bad one. It leaves the physician in an intolerable position. On the one hand it does not proceed from any coherent philosophy of personhood nor did it seek (as your present enquiry seeks) to find a basis for such a philosophy. Hence there is no rational basis from which an appropriate medical jurisprudence could be derived in doubtful or difficult cases. On the other hand it provided no inalienable basis for action. The fact that there is a juridical stance at all on termination of pregnancy implies that there may be abuses. But no clear principle emerges for deciding whether in a particular case a physician has, or has not, acted in accordance with the law. There is to my knowledge no legal definition of health or disease; and I have spent fifteen years trying unsuccessfully to find a medical one. Yet this non-structure is to be the basis on which the physician is to be expected to act! In my opinion, the law must be prepared to furnish its own definitions. The traffic laws do not make it a crime to "drive too fast" but a crime to exceed the speed limit.

At the same time I think many physicians would find some aspects of their duties rather distasteful. If all termination of pregnancy except for an explicit list of states (i.e. those incompatible with a product that had features even in the remotest human) were prohibited, they would from time to time be attendant on tragedies.

(b) The demand for genetic screening would, I am sure, be somewhat changed. It is necessary to distinguish here between screening of parents (e.g. as a wise preliminary to marriage in some cases) and screening of pregnancies for various conditions in the fetus. In general, the former would, I think tend to increase. Screening during pregnancy would doubtless be somewhat less done. But one should preserve a sense of proportion.

1. Even now genetic screening in pregnancy is done almost exclusively in cases where there is a less than even chance (usually very much less) that the fetus will prove

to have a condition that the parents consider undesirable. It is clear then that in the majority, or even great majority, of pregnancies the results of the test are reassuring. This optimistic role of screening is often overlooked, even by physicians.

ii. The current use of screening in pregnancy is by no means solely for purposes of diagnosis with a view to abortion. The genetic screening test which is the oldest and the most firmly entrenched is the test for Rh Blood group incompatibility between mother and child. The main thrust of this endeavor has been prompt treatment in the fetus and newborn child, and it represents perhaps the single greatest triumph in obstetrics in the last half-century. Other instances one might quote are the diagnosis of such biochemical disorders as phenylketonuria and galactosemia, where effective treatment should begin at birth or perhaps even sooner. Yet others are those in which the management of the labor depends on the findings (e.g. avoiding the risks of fetal bones breaking during labor in certain disorders of bone), immediate post-natal care (e.g. atresia of the esophagus, certain types of congenital hearts disease, albinism etc.)

iii. It might be argued that regardless of whether a decision hangs on the knowledge, the parents have the right to know the best information we have about what the expected outcome of the pregnancy may be.

(c) Theoretically the enactment of this bill would make for greater caution in any parents embarking on a pregnancy. However, in fact, I do not believe that it would have much impact on the already very prevalent use of contraception.

(d) One issue I would like to clarify. I would distinguish between the domains of private, and public, morality. Society connives at many acts in citizens that, nevertheless, the public does not approve of. The public does not explicitly approve of drunkenness, but does not take steps against it except when it occurs publicly and creates a danger or nuisance. I take it that the sense of this bill would be to declare the issues of personhood of the fetus and of termination of pregnancy to be within the domain of public morality. If so, the medical and scientific facts will in no way have been changed but the conduct of the physician will certainly change. Regardless of what the explicit enactments in the wake of S 158 might be (and I gather that they might operate to make the conditions for interfering in a pregnancy either more or less stringent) the physician will have the public authority behind him in his decisions and risk neither the ill-will of the patient nor litigation in the event of an unfavorable outcome.

I trust that these viewpoints will be of some help in your deliberations. Should you wish me to amplify any details I would be happy to try to do so.

Yours sincerely

EMurphy

Edmond A. Murphy, M.D., Sc.D.
Professor of Medicine,
Johns Hopkins University

EAM:ef

NATIONAL ACADEMY OF SCIENCES
2101 CONSTITUTION AVENUE
WASHINGTON, D. C. 20418

INSTITUTE OF MEDICINE

May 20, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of
Powers
U.S. Senate Judicary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is a response to your letter dated May 11, 1981 in which you asked me to comment on 3 critical questions bearing on Senate Bill S. 158. I shall respond to them briefly in this letter. A more complete response is found in a copy of the testimony I would have made had I been called on to testify as a witness. It contains comments on my background and qualifications for providing information on this question. I hope it can be submitted and included in the record.

It is my belief based on the best medical and scientific evidence that I can find that the question of human personhood is not a medical and/or scientific question.

The definition of human personhood is, therefore, essentially a moral, ethical, philosophical, religious and, in the most humane sense, a political question.

There is not currently available, nor is there likely to be medical or scientific data that in and of itself will define "human personhood"!

The continuum that is human development actually begins with human eggs and sperm which are living and human. The egg has the potential, albeit remote, to become a complete human organism, or at least to undergo partial development in that direction. No point along this continuum can be unambiguously designated by scientific means as determining when human personhood begins. It would seem that conception cannot be designated as this point because at this time and for some significant period afterward the zygote (fertilized egg) may become two or more persons or even a benign or malignant tumor.

The determination of human personhood is not medical or scientific, but is an ethical, moral, religious or philosophical issue for which there is no single correct answer. It is the beauty of our democratic, pluralistic society that it allows room for more than one answer to this difficult, if not impossible, question.

Thank you for the opportunity to comment on this vital issue. I hope that my remarks have been helpful to you and the other members of the subcommittee. Please do not hesitate to call if I can be of further assistance.

With best regards,

Robert F. Murray Jr.,

R. F. Murray, Jr., M.D.
Professor, Pediatric, and Medicine
Chief, Division of Medical Genetics
Howard University College of Medicine
and
Senior Scholar-in-Residence
Institute of Meicine
National Academy of Sciences

TESTIMONY OF
Robert F. Murray Jr., M.D.
(alternate Witness)

To The Senate Subcommittee on the Separation of Powers
of the Senate Judiciary Committee Held on:

May 20, 1981

Mr. Chairman and members of the subcommittee, I am honored to present information and opinion bearing on this very important Bill S. 158.

I am a Professor of Pediatrics, Medicine and Oncology and Chairman of the Department of and Graduate Professor of Genetics and Human Genetics at Howard University College of Medicine and Graduate School of Arts and Sciences. After receiving an M.D. degree from the University of Rochester, I trained in Internal Medicine at the University of Colorado Medical Center. My training in genetics began at the N.I.H. at the then named National Institutes of Arthritis and Metabolic Disease with Dr. Baruch Blumberg, a recent Nobel laureate, while a member of the U.S. Public Health Service and continued at the University of Washington, Seattle, subsequently receiving a Master's degree in Genetics while a fellow in medical genetics.

Since 1967 I have worked in genetic research, teaching and the delivery of services to patients and families with hereditary or genetically related problems.

I am a fellow of the American Association for the Advancement of Science, of the American College of Physicians, and the Hastings Center (Institute of Society, Ethics, and the Life Sciences) as well as a member of the Board of Directors of this organization. I am a member of the Mammalian Genetics Study Section and was previously a member of the Advisory Council of the National Institute of General Medical Sciences. I was, during its brief life, a member of the Ethics Advisory Board to the Secretary of HEW, now called Health and Human Services.

I present these remarks to you as a citizen of the U.S. and a member of a minority group still seeking to attain the rights and privileges of full citizenship and an equal share of the bounty of this great and powerful nation, as well as a sensitive, caring physician and scientist who has spent a great deal of time thinking about both the scientific and ethical issues bearing on Bill S. 158 which you are now considering.

Three questions have been asked of me that bear on the crucial issues addressed by this bill. I shall respond to those questions somewhat briefly and focus my comments on the implications of considering a fertilized ovum as a human being with all constitutional rights and privileges.

I know of no body of scientific or medical knowledge or information that will determine that human tissue, whether it be a fertilized egg or cells organized in organs or tissues as possesses personhood.

The determination of personhood or its definition continues to be as it has always been a moral, ethical, religious or philosophical question. I would not like to consider the determination of personhood a political question except where it reaffirms and protects the rights of citizens recognized as persons in the moral, ethical or religious sense.

Any careful, objective review of the latest medical and scientific knowledge of human embryology leads to the conclusion that there is no definitive point from the time the nucleus of the human sperm fuses with the nucleus of a human ovum or egg to the time of birth that clearly states, "before this moment this cell or collection of cells was not a "person" but after this moment this cell or collection of cells is a person!"

The ethics advisory board to the Secretary of HEW concluded that the fertilized human ovum is worthy of respect but does not satisfy the moral, ethical or philosophical criteria of personhood in the process of attempting to determine the ethical acceptibility of use of the technique of in vitro fertilization and embryo transfer.

Consider, if you will, what it will mean to consider a fertilized egg an actual human being. This single cell has the potential, after 9 calendar months and millions of cell divisions, to be born a fully functioning human organism with the further potential of becoming an independent adult person contributing to our society after 18 more years of growth and development both physical and emotional. But fewer than half of the fertilized eggs do not become full-term infants and a significant number of full-term infants born do not become functioning adults.

What is especially troublesome is the conflict that will arise if every fertilized human egg is considered a person! I refer to the fact that a small portion of fertilized eggs become two human organisms (identical twins) or even more human organisms (triplets, quadruplets, etc.), and another small percentage develop into atypical cells or tissues, that is tumors, malformed, disorganized, grotesque, and even malignant collections of cells that don't even have "humanoid" appearance not to mention those errors of development that result in humanoid forms that only just faintly resemble what might be considered anything like a human person. Most of these abberations have the normal number of normal appearing chromosomes.

These "errors" or variations in development make the designation of "personhood" a mockery and imply that other human tissues perhaps ought to be considered as worthy of personhood because with the further development of scientific technology the possibility that the technique of cloning humans might become a reality. The "potential" for human development resides in the genetic information contained in the cell nucleus of the fertilized ovum. If one can insert the nucleus of a human cell from some other stage of development into an egg whose nucleus has been removed or destroyed that cell would have the potential to develop into a copy of the individual from which that nucleus was taken. Since each diploid tissue cell would then have the potential to become, under appropriate manipulation and conditions, a functioning human being, cells in tissue culture with this potential might then have to be accorded the status of a human person.

Not infrequently, tumors called teratomas which can also become malignant are removed from various parts of the body, of individuals, usually the abdomen. Current theory suggests that these tumors which contain disorganized elements of human tissues may be a "twin" of the individual with the tumor, whose development failed. If this theory is confirmed, such a tumor according to S. 158 would be classified as a "person". Ought these abberations of development of the human organism be given names and then a christian burial after they have been removed surgically? Would their removal be legal?

These are only a few of the many serious difficulties and inconsistencies that are a consequence of designating a fertilized ovum a person. The presence of 46 chromosomes and the "potential" for becoming a human person does not make the fertilized ovum a person in a biological sense any more than the fact that the human egg has the potential through a process called parthenogenesis of becoming a human "person" without being fertilized by a human sperm.

In all likelihood, even the most intimate knowledge of human embryology, both cellular and mollecular, will not ever reveal the instant in time when an organized collection of cells becomes a "person". That determination now and probably for all time will rest on moral, ethical, religious, and in the most humane sense, political judgments and opinions.

This bill has clear implications for the acceptability of abortion as a medical procedure no matter what the reason might be. But it has important consequences in a variety of other medical and social contexts that cannot be ignored. I hope that the subcommittee members, in considering it, will keep the total picture and all its ramifications in mind.

the
children's
memorial
hospital

2300 children's plaza
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312 649-4000

Henry L. Nadler, M.D.
Chief of Staff
Given Research Professor
Chairman, Department of Pediatrics
Northwestern University Medical School
649-4012

1981 JUN -4 PM 2:06

June 1, 1981

Senator Max Baucus
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This letter is in reply to yours of May 13th.

The question of human "life" (which I assume is what you mean by human "personhood") is far from a medical or scientific question per se, although it obviously has scientific components; for example, scientific criteria can distinguish human from non-human life. The distinction between life and non-life (or in the present context, between life and potential life), however, has never been and is likely never to be made on scientific grounds alone. Indeed, the definition of death, which is merely the absence of life, is still a highly debated issue. And certainly, without a clear-cut and precise definition of "life", the question of when it begins is unanswerable by scientific criteria.

There are obviously a multitude of religious beliefs, moral and ethical judgements, and philosophical opinions on the subject. However, and this cannot be emphasized too strongly, they are exactly that: beliefs, judgements and opinions. Irrespective of the honest intentions and scientific caliber of anyone presenting them, they in no way represent scientific fact. For there are no scientific facts to bear on this subject.

Certainly,in my opinion, it would be inappropriate to ask a political and legislative body,such as the U.S. Congress, to decide when human life begins. And indeed, this is clearly not the question being asked. The question is "should the U.S. Congress legislate whether women and couples have the right to make their own reproductive decisions". This question, too, will provoke many divergent opinions. In my opinion,an across the board abolition of abortion, such as this bill (cloaked as it is in the guise of the human life question) would demand, would have disastrous, far-reaching and long-term effects on the population. Among numerous other consequences we could look forward to: prohibition of popular and much needed forms of contraception, such as various forms of birth control pills and intrauterine devices; a potentially dramatic rise in the death rate from illegal abortions and sharp increases in the economic and social burdens, including child abuse, caused by a million or more unwanted pregnancies each year; the abandonment of amniocentesis and related screening and prenatal diagnoses programs which currently provide important alternatives for families suffering from severe inherited diseases for which no treatment is available. In total, it is not an optimistic picture.

Since we truly cannot answer the question of when life - as a finite quantity - begins, perhaps the question we should ask is "What is the quality of the life that we as a population desire?" The answer to this question is attainable and it is certainly crucial.

Thank you very much for the opportunity to respond to the questions provided by your letter. It should be obvious from my reply that I hope the proposed bill is rejected.

Sincerely,

Lynn Fleisher

Henry L. Nadler, M.D.
Chief of Staff
Chairman, Department of Pediatrics

Lynn D. Fleisher, Ph.D.
Assistant Professor of Pediatrics

HN:LF:iad

MEDICAL COLLEGE OF VIRGINIA
VIRGINIA COMMONWEALTH UNIVERSITY
MCV Station • Richmond, Virginia 23298

Box 33

April 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your letter of April 16 addressed to Dr. Neil Holzman, in which you request information on the scientific basis for assuming that human life arises at the time of conception.

In my opinion, there are several serious defects in S. 158. In the first place, I know of no evidence that natural life arose more than once on this planet and the continuity of life has clearly been the main theme of research in biology for more than a century. To argue that each human life has a discrete beginning at the time of conception (and not before) is anthropocentric in the extreme.

Conception has sometimes been identified as the moment at which a genetically unique individual is determined. This may well be relevent to the legal concept of personhood since one would assume that an essential quality of a person is that he or she be uniquely identified. However, since the second meiotic division normally does not occur until after sperm penetration (i.e., conception), literally billions of genetically different individuals could arise even after conception, depending upon how the maternal chromosomes segregate.

The proposed legislation defines human life exclusively in terms of an event that is associated with sexual reproduction (i.e., conception). However, the fact that natural reproduction can also occur in man by a completely asexual process is beyond dispute. The available evidence suggests that monozygotic twinning may arise as late as 10-14 days after fertilization. In about 80 percent of identical twin pregnancies there is only one placenta, and since this group of twins share a common blood supply in utero they do not become completely separate until the time of birth. Some twins, of course, are conjoined at birth and remain attached unless they are separated surgically.

Senator Max Baucus
Page 2
April 29, 1981

Since there is no way to predict whether twinning will occur at the time of conception, every fertilized egg must be regarded as having the potential to develop into more than one separate individual and identical twins represent a specific example of individuals whose separate existence - or personhood - clearly does not begin at the time of conception. In this country there are at least 4,000,000 twin-born individuals about a third of whom are identical twins. Although they may represent a small minority of our population I believe that many people would be deeply offended to learn that identical twins had been excluded from the human race by legislative fiat simply because their personhood did not begin at the time of conception. If twins are not human, are they eligible for social security? Can they be drafted? Can they vote? If it wasn't such a serious matter, the potential consequence of S. 158 would be ludicrous.

I am not a legal expert, but sections 2 and 3 of S. 158 would seem to constitute an attempt to place a prior restraint upon both the Supreme Court and inferior courts in their handling of litigation that might arise from this bill. Is this such an important issue that we should sacrifice the concept of the separation of powers that is such a basic element of our form of government?

These examples are intended to illustrate the futility of attempting to define by legislation a single point in embryologic development at which all human lives can be said to have begun. The real issue, of course, is whether abortion should be criminalized. It serves no useful purpose and is potentially mischievous to invoke a fallacious scientific justification for the political solution of what is essentially an ethical issue. In my view moral issues of this type should not be resolved by restrictive legislation in the absence of a much more generally held consensus than currently exists in the country.

Yours sincerely,

Walter E Nance MD

Walter E. Nance, M.D., Ph.D.
Professor and Chairman
Department of Human Genetics

WEN:tdm

cc: Neil A. Holtzman, M.D.

NASSAU PSYCHIATRIC SOCIETY, INC.
Nassau (N.Y.) District Branch of the American Psychiatric Association
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ANTHONY RUSSO M D

EXECUTIVE SECRETARY
JACQUELINE CAST

June 10, 1981

Senator Max Baucus
1107 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Baucus:

We are concerned about the possible elimination of official approval of amniocentesis as a diagnostic tool for the prevention of certain birth defects in children, i.e. Down Syndrome and other chromosomal anomalies, neural tube defects, Tay-Sacks disease, Muscular Dystrophy, Sickle Cell disease, and many others. Patients at risk for any of the above conditions can be offered amniocentesis.

Amniocentesis is a proven safe prenatal test performed at the 16th to 18th week of pregnancy in approved medical settings. It gives the physician information regarding the developing fetus, which is then communicated to the patient. If the fetus is affected by retardation, handicap or lethal condition, the patient may then have an option to either abort the affected fetus or continue the pregnancy, being aware of the outcome. In our experience with a diverse population, from urban, suburban and the rural areas, multi-ethnic and religious groups, from all socio-economic strata, only a negligible number of families have opted to continue their pregnancies after the negative results of the amniocentesis were made available to them.

Families of the children with birth defects and genetic disorders are faced with the lifelong burden of caring for individuals with limited capabilities and for whom society has very little tolerance and offers minimal supports. These families are faced with increased longterm needs for specialized medical help. They need special education and therapies and possibly multiple hospitalizations for the child. Without adequate community support systems or even willing babysitters, feeling trapped, the needs for these families for counselling and psychiatric help increase. The normal siblings in such families also suffer the effects of this continuous psychological, physical and financial drain. The families themselves feel stigmatized and isolated. The process of mourning for the expected normal child that never was is lifelong.

We strongly feel that every individual has the right to benefit from the advances that medical science has made. We have learned that, contrary to Senator East's view that "cavaliere" attitude exists regarding termination of pregnancy, each family struggles painfully with the decision to abort a defective fetus. We are repeatedly asked if a mistake was made in findings, if the test can be repeated, if treatment or corrective procedures can be done. Unfortunately, we must answer negatively to the above.

We find unconscionable the current proposal that any family should be sentenced to live with the burden we have summarized here so briefly. The Committee should be aware that the burden extends beyond the family to the government, which must be prepared to provide an increasing base of community services if birth defects are no longer allowed to be prevented.

Sincerely yours,

The Woman's Committee
of the

Nassau Psychiatric Society, Inc.
1200 Stewart Avenue
Garden City, New York 11530

GJ:jmc

DEPARTMENT OF PEDIATRICS

Area Code 503 225-8194

Portland, Oregon 97201

UNIVERSITY OF OREGON
HEALTH SCIENCES CENTER

June 12, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Re: S. 158

Dear Senator Baucus:

I have delayed my response to your letter of May 13 in order to poll the opinion of many of my colleagues regarding the issue raised in S. 158. Most of those I have discussed this with tend to get much more emotional about the implications of the concept of human life beginning at conception than the concept per se. You asked for my view and I will convey them as such. However, the vast majority of my colleagues agree with me that any legislation designed to limit prenatal diagnosis and selective abortion of a potentially defective fetus would be a significantly retrogressive step.

The key issue is Chapter 101, Section 1(6-8): "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." The problem lies in separating "actual human life" from something that is merely "living" - "human" is the key word. It is of interest that Webster's dictionary defines human as "having human form or attributes" while neither medical dictionary in my office offers any definition for the word! I believe this reflects the fact that there is no scientific way to define "human" and thus I cannot accept the statement that scientific evidence indicates human life exists from conception.

No one would question that the fertilized embryo is a living cell just as the egg and sperm forming the embryo are living cells. This does not make the fertilized embryo any more "human" than either cell which contributes to its formation. Webster would say that the embryo becomes human when it acquires "human form or attributes." This still remains somewhat vague temporally but clearly is well beyond the time of conception.

Doernbecher
Memorial Hospital
for Children

The Honorable Max Baucus
June 12, 1981
Page 2

I still strongly believe that one must not get caught up in the semantics of the bill and miss the real focus of the bill - abortion. Prenatal diagnosis offers a tremendous hope for parents (and society) who would otherwise face the birth of a severely deformed or defective child. Recent court rulings holding physicians liable to litigation by defective children for not informing parents of the risk of continued pregnancy establish a legal basis for this position. The abortion of normal but unwanted fetuses is a harder question but is in accord with the position of the American Academy of Pediatrics that every child has the right to be born wanted. Thus, this legislation should be opposed because it represents broad and poorly documented attempt to control abortion rather than to truly protect human rights.

I thank you for your interest and your willingness to allow me to present my views.

Sincerely yours,

Robert C Neerhout

Robert C. Neerhout, M.D.
Professor and Chairman

P2:nf

THE MILTON S. HERSHEY
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College of Medicine / Department of Pediatrics

July 28, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

RE: Your Letter of 5/13/81 on S.158

Dear Senator:

In response to your explicit queries, I believe that:

1. The question of human personhood is *neither* a medical *nor* a scientific matter.

2. The question of human personhood *is* -- not in part, but in whole -- one of a moral, ethical, philosophical and religious nature. These are personal and private matters not intended, in this country, for public decisions. They must remain out of the political and legal arena, which pit *my* beliefs against *your* beliefs or, worse, some faceless judge.

3. Medical and scientific data cannot determine the definition of human personhood, either alone or in concert with more pertinent considerations.

4. The enactment of S.158 would instantly terminate the *legal* practice of: a. contraception; b. genetic screening; c. medicine. It would not at all terminate the *actual* practice of: a. contraception; b. genetic screening; c. medicine -- it would simply send them underground. We have already been subjected to the spectacle (and quite without the benefit of S.158, yet subsequent to *Roe* v. *Wade*) of watching an honorable physician defend himself (in Massachusetts) against a *criminal* charge of *murder* in this arena (even Scopes was accorded the honor of a civil trial with more memorable lawyers).

In response to your implicit query, I believe that:

1. The Founding Fathers intended the U.S. Congress to be a perfect mirror of the society it represents, reflecting every nobility and venality of that society.

2. It is.

3. It does.

4. As such, it will always have more than enough difficulty in such straightforward matters as representation, taxation, declaration of war, drafting of citizens, etc.

5. As such, it will continue to honor itself (and therefore us) by the enactment of a Marshall Plan ("the most unsordid act in history") as well as besmirch itself (and therefore us) by pursuit of Arab sheiks and Korean businessmen.

Even the Founding Fathers could not squarely face such a straightforward issue as slavery — hence, the *first* introduction of the concept of "personhood" into the Constitution. The current Congress is, of course, no braver, since it pussyfoots around the issue of abortion with "public funds" (only!). Even were the Congress more courageous than I ever expect it to be (but it shouldn't be *much* more courageous than its constituents), I personally would never recognize its competence or jurisdiction to tell me what to believe about "personhood", else I would also concede its right to define my reading, thinking and praying.

Sincerely,

N. M. Nelson

Nicholas M. Nelson, M.D.
Professor and Chairman

NMN/jlh

INSTITUTE OF MEDICINE
NATIONAL ACADEMY OF SCIENCES
2101 CONSTITUTION AVENUE WASHINGTON, D.C. 20418

1981 APR 30 AM 11:52

April 28, 1981

The Honorable Max S. Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am a member of the Social Issues Committee of the American Society for Human Genetics. Dr. Neil Holtzmann, Chairman of that committee, forwarded your letter of 16 April 1981 about hearings on S.158 to me. I am writing as a scientist and physician in the specialty of clinical genetics. My answers to the three questions you pose in your letter follow.

1. Do you believe that the question of human personhood is a medical and scientific question?

Based on present day scientific evidence, no. There is no question that any cell of human origin that is respiring, growing and replicating is alive and "human," but cellular life is not "human personhood." "Human personhood" cannot be defined or determined in scientific terms. The fertilized egg is biologically alive, and has the potential of developing into a human person. If all goes well, and the genetic makeup of the product of conception is adequate, and the uterine environment sufficiently nurturing, the cell mass goes on to grow and differentiate into a human being. The answer to the question of when "personhood" enters the developing and differentiating cells and organ systems rests, not on scientific judgment, but on what people choose to define as the qualities and attributes of a human being, to be valued as such by society.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious, or political question?

Definitely, yes. "Human personhood" questions stem from human values and include all of the dimensions in your question.

3. Would you agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context?

Definitely, yes, as explained in my answers to the first two questions.

Page 2
Senator Baucus
April 28, 1981

In sum, my biomedical training and experience bring me to the firm conclusion that present day scientific evidence cannot indicate that actual human life (in terms of "personhood") can be deemed to exist from conception.

Sincerely yours,

Elena O. Nightingale, M.D. PhD.

Elena O. Nightingale, M.D., Ph.D.
Senior Program Officer
and
Visiting Associate Professor of
Social Medicine and Health Policy
Harvard University Medical School
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ALBERT B. CHANDLER
MEDICAL CENTER
COLLEGE OF MEDICINE
DEPARTMENT OF PEDIATRICS

June 1, 1981

Senator Max Baucus
United States Senate
Subcommittee on Seperation of Powers
Washington, D.C. 20510

Dear Senator Baucus:

This is a reply to your recent letter regarding S. 158. I believe that human life begins at conception and that the developing embryo is a distinct human person. Whether this human person is a legal person will be a political question. The Supreme Court decision of Roe v. Wade was a most unfortunate one. Prior to that time, abortion was considered illegal unless the mother's well-being was at stake. The availability of abortions varied from state to state depending on how danger to the mother's health was interpreted. Psychiatric indications or psychological trama was used in some states as acceptable criteria for abortions while other states permitted abortion should be evidence that the fetus should be malformed. The enactment of S. 158 would in essence grant the unborn child the same protection it does for all other citizens. This change would have an effect on genetic screening programs that identify defective infants where there is no prenatal treatment available. The only present form of prevention is abortion. To me this has never been a satisfactory way of preventing disease. It is difficult for me to accept the distruction of a human life as a reasonable way of preventing a disease. I do not feel the law would have any effect on the use of contraceptives since it would not be possible to prove that conception had occurred prior to the use of the contraception devices and certainly the intent of this law is not to discourage family planning but to prevent the destruction of human life.

Since I am personally opposed to abortion, I can support this bill but I am concerned that it may cause significant problems in specific cases. It is customary medical practice to deliver an infant prematurly if the mother has severe toxemia of pregnancy. This condition is life threatening to the mother and of course to the infant. The obstetrician who delivers a toxecmic woman prematurely could be liable should this infant die because of prematurity. Will lawyers take such an opportunity to sue such physicians on behalf of the now deceased infant? I believe physicians caring for pregnant women always had the responsibility for protecting both lives. Clearly anything that endangers the life of the mother, endangers the life of the unborn child. Physicians are already concerned about the increasing number of malpractice law suits and are concerned about the effect of the proposed bill. It would certainly be simpler if the Supreme Court could reverse its decision. This country behaved in the past as though the unborn child did have rights because for centuries abortion was considered both immoral and illegal.

I hope these views will be helpful to you and if I can provide any further information, please do not hesitate to let me know.

Sincerely,

Jacqueline A. Noonan, MD

Jacqueline A. Noonan, M.D.
Professor and Chairman
Department of Pediatrics

JAN/par

University of Pittsburgh

SCHOOL OF MEDICINE
Department of Pediatrics
Office of the Chairman

1981 JUN 11 PM 2:07

June 9, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am responding to your request as the ranking minority member of the United States Senate Judiciary Committee's Subcommittee on Separation of Powers to express my views regarding the scientific evidence that personhood begins at conception as stated in S. 158. My response is concise and clear. When actual human life (and personhood) begins is an issue that lies in the realm of moral philosophy, religious teaching and personal belief. The answer cannot be found in biology or medicine because there simply is no scientific evidence that bears on the question.

Having stated my view on this fundamental issue let me express my concerns should this bill be passed (and found to be constitutional) on two inevitable consequences of the law, illegal abortions and cessation of amniocentesis.

Without any question the number of illegal abortions would sharply escalate. Past experience has shown this to be the case. Attendant with this will be a major increase in maternal mortality, maternal morbidity and health costs necessitated to provide care for the complications of illegal abortions.

Amniocentesis, a valuable tool for the detection of chromosomal abnormalities in the fetus, would doubtless be discontinued if S. 158 were passed. A crucial point regarding the value of amniocentesis is usually overlooked. While the purpose of the procedure is to detect an abnormality the usual result is to diagnose a normal fetus. Let me give an example. The most common reason for performing an amniocentesis is for the detection of the chromosomal abnormality which causes Down's syndrome. The risk of Down's syndrome increases sharply with advancing maternal age. The risk in a pregnant woman over 40 years of age is about 5%. Put the opposite way, 95 out of 100 women who become

The Honorable Max Baucus
United States Senate

Page Two June 9, 1981

pregnant after age 40 have a fetus with normal chromosomes. Many women without the knowledge of a normal chromosome study by amniocentesis will simply not take the one in twenty chance that their fetus is abnormal and will seek abortion, legal or illegal. In every condition when amniocentesis is employed it proves normalcy far more often than it uncovers disease. In short, the procedure saves lives.

Although you asked my opinion because of my professorial position with special interest and expertise in fetal/neonatal medicine, you should know that I am the President-elect of the Assembly of the Association of American Medical Colleges, whose constituency includes 126 medical schools, the majority of teaching hospitals and 70 academic societies representing virtually all of the medical school faculty in the United States. I have shared my views expressed in this letter with Dr. John A. D. Cooper the President of the AAMC and the senior staff who concur with them.

I appreciate the opportunity to give my opinion on this very important topic. I would be very willing to appear before the Subcommittee to expand these views and answer questions.

Sincerely,

Thomas K Oliver Jr

Thomas K. Oliver, Jr., M.D.

TKO:cb

cc: John A.D. Cooper, M.D.

Baylor College of Medicine
DEPARTMENT OF CELL BIOLOGY • 713 791-4701

May 26, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your request for an opinion on Senate Bill S. 158 which defines human personhood as beginning of conception. My answers to your questions are as follows:

1. Considering all scientific evidence currently available, it is clear to me that the question of human personhood is not a medical and scientific question.

2. It is my view that the question of human personhood is complex and in part involves ethics, philosophy, religion and politics. I feel that such a question cannot be settled by law.

3. In my judgement this bill would have an extremely negative impact on the country if enacted. In this way, a capricious decision by lawmakers could greatly inhibit the general practice of medicine. All of our exciting new methods for genetic screening to prevent the birth of mentally retarded or physically incapacitated babies would be eliminated. I think the use of contraceptives would border on illegality and would place 100 million women in the position of breaking the law. The social and economic impact of loss of contraception on the United States would take years to estimate. In a sense it would both change our population dynamics and economy and also restrict the lives of all modern day women.

Although I am not an advocate of abortion on demand, I am quite disturbed by the current Congressional reaction to the abortion question. This is an area that is not served well by extremist legislation and many of my colleagues and friends feel that the members of our current Congress have lost the ability to approach this issue with sensitivity and moderation. I certainly hope this bill is defeated.

Sincerely yours,

Bert W. O'malley

Bert W. O'Malley, M.D.
Professor and Chairman

087 999 557

/gbc

ST. LUKE'S EPISCOPAL HOSPITAL, 25TH FLOOR • TEXAS MEDICAL CENTER • HOUSTON, TEXAS 77030

John M. Opitz
Saddle Mountain Drive
Clancy, MT 59634
April 21, 1981

[illegible] APR 24 [illegible] 2

The Honorable Max Baucus
United States Senator
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

The three questions you ask in your letter of 4/10/81 regarding Senate Bill 158 can be answered quite succinctly with no, yes, yes respectively. Beyond that please allow me to make some personal comments.

I am deeply concerned that proposed Senate Bill 158 (First Session of 97th Congress) will violate the fundamental right of women, as defined in *Roe vs. Wade,* to make, in conscience, the decisions concerning their early pregnancy they deem in the best interest of all concerned.

The assertion that "Human Life" and "personhood" (p 2, line 12) begins at conception is not a scientific but a philosophical proposition which cannot be investigated in a scientific manner. In a pleuralistic country with constitutional safeguards against religious constraints of the majority by a minority this philosophical or religious point of view ought not to become a law binding on all. *Viability* ought to be at least a prerequisite for extra-uterine existence in which case the infant would be legally protected (although in many cases a fairly arbitrary decision will be made on whether to institute or to continue life support measures in a severely damaged or malformed infant).

As the appended manuscript shows, some 2/3 of all human ova, embryos and fetuses die prenatally anyhow, and no human laws can set aside this aspect of nature. Compared to that massive natural loss the amount aborted on account of incest, rape, birth defects and to save the mother's life constitutes only a minute fraction of all prenatal death. Certainly a far greater number are killed yearly in car accidents, murders and suicides, from alcoholism, and from lung cancers due to smoking - all preventable deaths of individuals of proven viability and potential or proven productivity.

If S 158 is passed I will have struggled in vain over the last 20 years to establish clinical genetics as a valid branch of medicine, for with inability to abort, essentially all prenatal diagnosis will cease (in Wisconsin our data showed that only about 25% of women who are told of a defective fetus after prenatal diagnosis elect *not* to abort). Prenatal diagnosis is without question the most cost-effective form of preventive medicine; S 158 begs the question as to who will pay for and support all of the defective persons that shall be born when prenatal diagnosis will be abolished. Contrary to our critics and the purported statement by the nominee for the position of Surgeon General of the United States, prenatal diagnosis is not a "search and destroy mission" but rather a *pro-life* measure since 95% of all fetuses so tested turn out to be normal with respect to chromosome status and neural tube development and are carried to term.

The death of a young woman, previously healthy and a productive member of society, at the hands of a criminal abortionist impresses me as a far greater moral burden for the sponsors of S 158 to bear than the abortion of a fetus with a condition known to be associated with severe mental retardation. The sponsors of S 158 ought to take a walk through the many obstetric services I have seen in so-called developing countries in which at any day literally dozens of young women die of septic abortions.

If abortions are to cease are the sponsors of S 158 then willing to entertain an amendment recommending and making contraception available to all who need it?

A statement of my credentials is appended; you are welcome to use my above statement in any manner you deem useful. I am grateful to you for the chance to comment on the matter.

And with best wishes and warmest regards, I remain

faithfully yours,

John M. Opitz

JMO:lms

Enclosure

Pediatrics in Review in Press
[illegible]

PR37-80/81

5/21/80

THE STUDY OF THE MALFORMED FETUS AND INFANT

John M. Opitz, MD

Shodair-Montana Regional Genetics Program and Genetics and Birth Defects Unit, Shodair Children's Hospital, Helena, MT; and Departments of Pediatrics and Medicine (Medical Genetics) University of Washington Seattle; Departments of Biology, of History and Philosophy of Science, and of Medicine (WAMI Program), Montana State University/Bozeman.

Address for reprints and correspondence:
Dr. John M. Opitz
Shodair Children's Hospital
Box 5539, 840 Helena Avenue
Helena, MT 59601

Educational Objectives

Ability to evaluate a stillborn or neonatally dead child for malformations and/or the presence of a genetic defect and provide genetic and psychosocial counseling after such a loss.

INTRODUCTION

Nature's apparent contempt and ruthlessness in dealing with developmental defects antenatally does not justify a similar attitude by professionals dealing with abnormal products of conception postnatally. With ever-increasing frequency couples request genetic counseling for infertility, spontaneous abortions(s), stillbirth(s), neonatal death of mature or premature infants, and death of infants with or without apparent malformation.

The extent of prenatal death in humans is truly astonishing (Opitz, 1976) and will be reviewed below. In addition, about 1/3 of all US women will never have children because of voluntary reproductive constraints (mostly voluntary sterilization, Westoff 1978), and some 12% of all married couples are unable to have children because of infertility and sterility (Opitz et al, 1979). Yet, in 1978 the US population showed a natural increase of 0.65%; in early 1979 the fertility rate was 68/1000 women 15-44 years old (Wegman 1979), and the desire to have children remains general. In many cases it becomes truly desperate because of inability to have viable or normal offspring, and in quite a few cases voluntary constraints reduce potential births because of fear of further adverse outcome or of producing a living but severely defective child.

Counselors continue to see both extremes of ill-considered advice to many such couples - namely the "lightening never strikes twice" response, or the suggestion that most or all subsequent offspring will be defective. In the former situation recurrence of defect has in fact been observed, and in the latter one may see unjustified fear of conception to an age beyond the ability for the woman to bear children.

Neonatally, pediatricians are frequently mainly interested in the diagnosis of the condition in order to determine whether or not to keep the infant alive. Pathologists usually are more interested in the cause of death than in the cause of the defect, whereas the family (and genetic counselor) may be most interested in whether it will happen again. This answer must be based on careful examination of such fetuses and infants; this remains generally perfunctory in the extreme. The nonchalance of many pathology labs in handling such material and the inability of anatomists to take a greater case load or even a passing interest in the subject of fetal malformation remain sources of great concern. Full diagnostic examination is frequently possible only in laboratories which are grant-supported to pay for expenses unrecoverable from third-party carriers for such services. Frequently, neither obstetrician, pediatrician, pathologist nor anatomist is able or willing to give genetic counseling, and in case after case genetic counselors are asked about diagnosis, cause and likelihood of recurrence without being able to draw on adequate phenotypic data. Under such circumstances exhumation has occasionally been resorted to, usually with helpful results.

The extent and the nature of the biologic problem and ways of dealing with it are outlined in the following paragraphs.

EXTENT OF THE BIOLOGIC PROBLEM

In 1970 Witschi reviewed the work and data of Hertig and his coworkers (Hertig et al 1956, 1959, Hertig, 1967) on a small number of ova recovered at hysterectomy from women of proven fertility and known menstrual and coital dates, and concluded that:

1.) About 16% of human ova exposed to sperm do not divide, either because they are not penetrated by sperm or because the meiotic mechanism is not functioning.

2.) Another 15% of these ova are lost during the first postovulatory week at various pre-implantation stages.

3.) Some 27% of fertilized ova are aborted spontaneously during early implantation and pre-villous stages in the second week, presumably because they are grossly abnormal.

The latter estimate was based on the histologic appearance of a few of Hertig's implanted specimens and had wide confidence limits. Data on early conceptual loss has been very difficult to obtain, since the loss may occur before the pregnancy is even recognized. However, recently Saxena et al (1974, Landesman and Saxena 1974) developed a radioreceptor assay that takes advantage of the specific binding ability of bovine corpus luteum plasma membranes for luteinizing hormone and human chorionic gonadotropin (hCG). The test can be performed within 60 minutes on 50-100μl of plasma or serum and in several hundred cases has shown close to 100% reliability in detecting normal pregnancy of various durations from a week following conception; it can detect "pregnancy" as early as the 6th day after ovulation, i.e. before the expected time of implantation. So far, this extremely sensitive and efficient method has not been widely used to re-estimate second week mortality. However, British workers (Williamson and Miller 1980) have done a prospective study of early conceptual loss by assaying early morning urine for the beta sub-unit of hCG. In a study of 148 cycles in which implantation had occurred, 47 (31.7%) never showed anything more than biochemical evidence of it. Thus, however difficult they may have been to believe, the Hertig/Witschi estimates have now been shown to have been conservative.

4.) In the Williamson and Miller study 14 of the remaining 101 (9.5%) pregnancies ended in spontaneous abortions before 20 weeks. This is a low figure; life-table methods usually give estimates closer to 25% (Abramson 1973, Bierman et al 1965, Erhardt 1963, Taylor 1970).

5.) The 1975 Wisconsin fetal death rate ("stillbirth" rate, i.e. total number of fetuses $\geq$ 20 weeks of gestational age and of $\geq$500 gm weight per 1000 live and stillborn fetuses) was 517/65,675 or about 8/1000 (Wisconsin, 1975).

6.) The total infant mortality rate in Wisconsin in 1975 was 855/65,145 (13/1000) live births, a little less than the national average (Wisconsin 1975) distributed as in Table 1.

Thus, of a theoretical 100 conceptions in humans almost 2/3 result in prenatal failure or death of the infant by the end of the first year of life.

CAUSES OF PRENATAL AND NEONATAL DEATH

Fetal wastage may seem a relatively unimportant aspect of human mortality since, though it is a quantitatively major component, it has less medical and social impact than death after birth. Nevertheless, its study is very important as a means of detecting abnormalities that may be a portent of future risk.

A strong association between fetal malformation and prenatal death has been known for a long time (Mall 1908, Hertig and Sheldon 1943). Without question, chromosome abnormalities are the greatest cause of prenatal death. In 1961 Penrose and Delhanty observed the first chromosome abnormality in an aborted fetus - namely triploidy. Since then, literally thousands of embryos, fetuses, and live-born infants have been studied cytogenetically. Data from the previous section and results of cytogenetic studies are incorporated into Table 2 which needs a few words of explanation.

The "number remaining" in line B is the actual total of fertilized conceptions (148) studied by Williamson and Miller (1980); the corresponding number in line A, the actual numbers lost in lines A and B and the total of initial ova (214) are calculated on the basis of the Witschi/Hertig figures cited in the previous section. The rates of chromosome defects on lines C and D are based on the work by Boué and Boué (1973). The rate of 0.621 for abortions at less than 20 weeks of development probably corresponds very accurately to the actual rate, however, the rate of 0.783 cited for embryos lost before the first missed period may not since many of the 2 week specimens studied by Boué and Boué had reached a 2 week stage of development but were usually aborted some weeks later. The 0.82 rate of chromosome defects for non-dividing ova and abnormal zygotes lost before implantation is a conservative estimate based on the reasonable assumption that the frequency of aneuploidy and polyploidy at this stage of development is not less but higher than in the succeeding stage. The high rate of attrition in these earliest stages may represent in part an effect of follicular or postovulatory overripeness which, in amphibian experiments, is known to produce a high rate of aneuploidy and polyploidy (Witschi, 1970).

The rate of chromosome defects in stillbirths is taken from the work of Bauld et al (1974), Machin and Crolla (1974) and Kuleshov et al (1975); the rate of chromosome defects in liveborn infants is taken from the review by Jacobs (1977).

Thus, Table 2 suggests that Witschi (1970) and Boué et al (1975) were correct when they estimated that at least one-half of all human ova have a chromosome aberration.

In sum - about 1/2 of all human ova and conceptions and 1/4 of all embryos and fetuses may have a chromosome defect; the rate of aneuploidy and polyploidy in aborted embryos and fetuses, stillborn fetuses, and liveborn infants is respectively 60%, 6% and 0.6%.

The frequency of chromosome defects as a function of prenatal developmental age was documented by Boué and Boué (1973) on the basis of 1205 specimens. Table 3 shows that the rate declines with increasing fetal age; initially it is between 70-80%, then it drops to 25% between 8 and 12 weeks of development.

The observed prenatally lethal chromosome defects that have been observed include in order of frequency: autosomal trisomy (50%), 45,X constitution (18.7%), presence of an extra set of chromosomes (triploidy) 15.4%. Extra chromosomes in the first group have included all except 1; at the top of the list is trisomy 16. The outcome in more than 98% of unbalanced chromosome defects is spontaneous abortion; in most instances of an extra sex chromosome (47,XXX, 47,XXY, 47,XYY) survival till birth occurs. Some autosomal trisomies can be considered *sublethals* because they allow for somewhat longer survival than others; i.e. trisomies 21 (Down syndrome), 18, 13, 22, and, rarely 8 (mostly as mosaics). However, even in the Down syndrome there is greater than 50% prenatal mortality (Creasy and Crolla 1974, Hook 1978).

A relationship between maternal age and chromosome defects has been suspected for half a century. In 1932, Waardenburg strongly suggested that the Down syndrome might be due to a chromosome abnormality. He reasoned as follows: "However, the stereotypic recurrence of a whole complex of anomalies in mongolism remains a particularly fascinating problem. I should like to stimulate the cytologists to determine whether... this might not be an example of a specific chromosome aberration. Why should this not also occur in humans, and if not lethal in effect why could it not cause a complex syndrome? One should determine if mongolism might not be associated with 'chromosomal deficiency' through 'non-disjunction' or conversely with 'chromosomal duplication.' It is of course conceivable that only an imbalance of parts of chromosmes (chromomeres) might be present: a 'sectional deficiency' through 'translocation' or...'sectional duplication': that would be somewhat more difficult to demonstrate cytologically. In any event, my hypothesis has the advantage of being testable and that it would explain the maternal age effect; in males such an extraordinary number of cell divisions occurs that just on that basis alone the chance of chromosome aberration is increased without a special age effect. If my hypothesis should turn out to be correct then one would have attained at once an important insight into constitutional problems and linkage phenomena in man." (Author's translation). Leridon (1973), using data of Boué and Boué, estimated that at a maternal age of 20 the ratio of spontaneously aborted fetuses with and without a chromosome defect is about 2:3; at maternal age 40 or older it is about 6:1.

The occurrence of prenatal chromosome abnormalities may not be completely random. The 1977 summary by Jacobs on 70 women who had chromosome studies on two consecutively aborted embryos showed that "those who have [had] one chromosomally abnormal abortion tend to have another chromosomally abnormal abortion, and, conversely, those who have [had] a [chromosomally] normal abortion tend to have another abortion with a normal chromosome constitution,...these [chromosomally abnormal] conceptions seem to involve only trisomies,... [an] effect...restricted to trisomy for certain chromosomes." However, the probability of having a second abortion is higher if the first abortion is chromosomally normal.

The types of chromosome aberrations seen in liveborn infants were summarized by Jacobs (1977). Table 4 shows that over 1/3 of cytogenetically abnormal liveborn infants have an extra sex chromosome (47,XXX, 47,XXY, 47, XYY), about 1/4 have autosomal trisomy (mostly Down syndrome) and about 2/5 (40%) have a structural defect. Of the latter, 1/4 are unbalanced and generally are phenotypically normal, but have 15% reduced fertility. Those with sex chromosome abnormalities tend to have a rather bland phenotype and are usually not detected neonatally; the exception is the rare patient with the Ullrich-Turner syndrome and 45,X chromosome constitution or variant thereof.

Table 5 shows that in the perinatally dead, chromosome abnormalities occur with a frequency over 10 times greater than in the general population of liveborn infants (Bauld et al 1974, Machin and Crolla 1974, Kuleshov et al 1975). When cytogenetic results are ordered by cause of death the following tabulation emerges (Table 6, Bauld et al, 1974, Machin and Crolla 1974).

Thus, rates are highest in antepartum deaths - especially among macerated fetuses; not surprisingly, chromosome abnormalities are most frequent in fetuses with multiple (lethal) malformations. It is of interest that chromosome defects are found in other classes of causes as well; Machin and Crolla (1974) found a chromosome abnormality in 13.4% of infants and fetuses with a lethal malformation, but in 2.5% of those dying of other causes (a rate 4 times as high as that found in the general newborn population). The 18 trisomy syndrome was observed in 8 of the 28 (28.6%) abnormal fetuses studied by Machin and Crolla.

In 225 term infants of low birth weight for gestational age Chen et al (1974) found 5 gross chromosome abnormalities but only one in 225 matched controls; all 6 of these infants were trisomic and phenotypically severely abnormal. Thus, the need to examine perinatal deaths for chromosome abnormalities is abundantly clear.

The incidence of chromosome defects among couples with repeated fetal wastage (2 or more spontaneous abortions, with or without additional fetal or infant deaths, with or without normal living children) varies from zero (Ward et al, 1980) to 100% (Wisniewski et al, 1980), depending on the circumstances of ascertainment. However, the average of 12 recent studies (Kim et al, 1975, "Southampton Symposium" 1980, and Ward et al, 1980) was 72/977 (7.2%) of couples (3.6% of persons). These studies all employed modern band-staining methods which double the yield over older methods (q.v. the review by de la Chapelle et al, 1973: 3.52% of couples or 1.76% of persons.)

Since a chromosomally abnormal conceptus increases the probability of a live born, chromosomally abnormal child in subsequent pregnancies it is important to do chromosome studies on stillborn infants and on abortuses whenever possible, so that prenatal diagnosis can be considered.

Apart from chromosome defects, therapeutic abortion, hyaline membrane disease and prematurity, there are many other causes of fetal and infant death. The most common of these are malformations mostly of multifactorial origin and some gene mutations.

Excessive alcohol intake may be a cause of second trimester abortion.

It is a remarkable fact that most fetuses with an apparently single malformation also die prenatally. The data in Table 7 were derived by Nishimura et al (1968) from a large series of therapeutically aborted embryos (which have an overall rate of chromosome abnormalities of 1.7%, Kajii 1973); thus, it is not very likely that more than a very small fraction of this massive mortality rate can be attributed to aneuploidy or polyploidy.

Congenital infections (listeriosis, mycoplasma, several types of viruses) are not commonly identified as cause of fetal and infant death (Driscoll, 1967, Taylor-Robinson and McCormack 1980); uterine malformation and myomas, ectopic implantation (Matsunaga and Shiota 1980), abnormalities of placentation and fetal number are rare causes of fetal defect and death. Maternal diabetes and alcoholism must now be listed as two very important additional causes of fetal defect and death; these seem to be particularly notable problems in the US Native Americans.

METHODS OF STUDY

The proper work-up of an abortus or stillborn infant requires coordinated planning and advance preparation.

Because of the well-known risk of fetal defect or death in cases of first trimester vaginal bleeding, many methods have been developed to assess the prognosis of such pregnancies, including ultrasound scanning and studies of serum levels of placental lactogen, α-fetoprotein, human chorionic gonadotropin, estradiol, progesterone, and the more recently introduced pregnancy-specific β-glycoprotein (Jouppila et al, 1980).

If the indications are that abortion may or will occur the patient should be given written instructions on what to do in the event, including emergency room and/or office visit during or immediately after the event in order to place into a sterile receptacle any material that has been expelled or may be produced. Offices and pathology laboratories should have well established, written policies on handling these specimens - if necessary, posted in the pathology laboratory so that persons unfamiliar with daytime or weekday routine will react correctly.

The cytogenetics laboratory should keep fresh tissue-culture media in the pathology refrigerator at all times and should have a call precedure worked out so that in all cases where the cause of fetal death is still unknown, routine samples for chromosome culture(s) are obtained and such cultures are established as soon after the event as possible. Neonatal death should be anticipated whenever possible and blood for cytogenetic studies obtained *before* death.

The obstetrical attendant should in all cases make available to the coordinating developmental pathologist the woman's medical, gynecological and obstetric history.

Explicit note should be made of maternal weight gain and vigor, frequency and type of fetal movements. In case of a dead fetus that appears normal and has no chromosome defect, it is particularly important to check the mother for renal disease, high blood pressure, infections, drug addiction and alcohol use, diabetes mellitus or prediabetes, hemoglobinopathies, uterine defects, the presence or absence of any genetic disorder or endocrinopathy, especially hypothyroidism. A careful family history needs to be taken on both partners, and a careful physical examination should be performed on both.

The placentas on *all* deliveries should be saved until it is established that the fetus or infant is normal. In case of fetal abnormality the placenta should be studied by clinician and pathologist who should record size and other physical aspects, degree of infarction, evidence of infection, amnion nodosum, or cryptic twinning, and the state of membranes and cord. This is particularly important in case of twinning, ectopic pregnancy and uterine defects and myomas, and the ADAM (amniotic deformities - adhesions - mutilation, or "amniotic bands") sequence.

The pathologist should be well versed in human developmental staging and should have worked out a routine for logging-in the specimen, getting data and history forms filled out, measuring, examining and photographing the specimen or fetus. A most searching physical examination should be done on all fetuses, including a study of dermatoglyphics and intra-oral structures. A good stereo dissecting-photomicroscope will be needed to study and photograph small specimens, and a Faxitron® or similar mini-Xray machine should be used to record skeletal structure. Placental or decidual tissue should be studied microscopically. Unless death was clearly due to some other cause, routine viral, mycoplasma and bacterial cultures should be submitted from decidual-placental and fetal material.

Aside from standard references on general and neurological developmental pathology (Persaud et al, 1979, Friede 1975, Lemire et al, 1975, Morison 1970, Potter and Craig 1975, Willis 1962) the pathologist must realized that there are hundreds of reports on the subject of the malformed fetus in the older literature, extending in a substantial manner, for at least 160 years, i.e., to the most productive period of Meckel's life; the patology of many causally different types of fetal defects is beautifully illustrated in the recent review by Shepard and Fantel (1979).

In a larger clinical center or in a university hospital, study groups to focus on particular cases or areas, or to review all cases may be established and include pathologists, clinical or experimental teratologists, anatomists and interested clinicians. If, for examples, the infant or fetus had the 13-trisomy syndrome and if anatomist colleagues are intersted in such material (and not back-logged for a long period of time) it is common courtesy to inform and/or transmit to them the material with written instructions on ultimate disposition (medical school or hospital disposal, return to family for burial, cremation with return of ashes to family etc.) Receipt of such material and/or specimens must be acknowledged in writing and assigned a lab number; occasionally clinicians are chagrined by loss or inability to trace products of conception or a fetus, an event doubly embarrassing if persuasion was

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needed to get it in the first place. Where anatomists/teratologists are involved in diagnosis the family and clinicians are entitled to results within a reasonable time, which should be made explicit to all concerned. Waiting periods of months or years are not tolerated well anymore, reduce chances of further collaboration, and in a given case, may make repayment from third-party carriers difficult if not impossible.

Data and/or conclusions should be transmitted as soon as possible to the responsible clinician in charge who should make it his/her responsibility to see that the family obtains appropriate counseling. Counselors will examine the transmitted data and establish immediate contact with the persons or family to inform them of procedures and appointments, and if necessary, get releases signed to obtain any other information needed about this, previous and/or related fetal deaths, and to obtain a complete and accurate family history. Depending on circumstances, it may be necessary to verify vital statistical data at the State Bureau of Vital Statistics, interview relatives, or initiate cytogenetic studies on parents before the (first) counseling session. This session may be primarily devoted to dealing with the parents' grief which, unless done explicitly, may impede reception and understanding of important counseling information.

RECURRENCE OF ABORTION AND PERINATAL LOSS

Several studies have been published on subsequent outcome and recurrence risk after an abortion and/or fetal death (for older literature see Poland et al 1977).

In 1973 Leridon reported on a prospective study of 3185 pregnancies from the obstetric service of the Hôpital Créteil. After an abortion in the first pregnancy the risk of abortion in the second was 28.2%; after abortions in the first 2 pregnancies the risk of abortion in the third was 37.9%; and after loss of the first 3 the risk to the fourth was about 50%. In women who had not had a spontaneous abortion in the previous pregnancy the risk of abortion in the next pregnancy was 16.1%; the figures for the third and fourth pregnancies were 17.5% and 12.6% respectively.

Similar results were reported by Poland et al (1977) in a masterful study which ought to be required reading for all persons concerned with the subject. Poland and her coworkers studied the outcome of 638 subsequent pregnancies in 472 women who had had at least one previous spontaneous abortion. Table 8 summarized their results.

The patients of Poland et al were divided into four groups on the basis of reproductive history before the index abortion:

Group 1: no pregnancies before index spontaneous abortion

Group 2: all previous pregnancies resulted in live-born children

Group 3: live-born children and previous fetal or perinatal (up to 28 days after birth) loss

Group 4: only pregnancy loss(es) before index spontaneous abortion

Table 9 summarizes outcome by group.

Thus, the best outcome is in women who had not had any pregnancies before the index abortion. In the latter case almost one-half of all subsequent pregnancies resulted in failure. In this study outcome in women who had only had previous abortions could be related to number of consecutive spontaneous abortions as follows (Table 10):

This confirms the conclusions of Leridon quoted above, namely the greater the number of previous spontaneous abortions the greater is the risk to the subsequent pregnancy.

Perhaps more important to the family are late fetal deaths and stillbirths.

INCIDENCE AND RISK OF RECURRENCE OF MALFORMATION AND/OR GENETIC DEFECT IN STILLBIRTH AND PERINATAL DEATH

Newcombe's (1968) empiric recurrence risk study of outcome after stillbirth showed that after the birth of one stillborn child the risk of further stillbirths, postnatal death and registerable handicaps in subsequent pregnancies was more than doubled. In case of 2 or more prior stillbirths the combined risk increased five fold and affected one third of all subsequent fetuses (Table 11). The risks following 2 stillbirths are based on a small body of data which must be enlarged to yield more reliable estimates of risk. As with all empiric risk figures it must be kept in mind that a given risk figure may not apply equally to all at risk but that it may represent the weighted average of at least 2 populations - one at low or negligitly low risk (those whose conditions was due to sporadic environmental events, chromosome and gene mutations) and another at more substantial or high risks (those representing segregating gene or chromosome defects or intrinsic maternal effects present with every pregnancy - e.g. maternal PKU). Data such as those of Newcombe do not lend themselves to further causal analysis and do not help decide whether in a given case a high or low risk situation prevails. Since it may make an enormous difference to a couple whether they face a negligible recurrence risk (e.g. after a previous stillbirth with thanatophoric dwarfism) or a 25% recurrence risk (e.g. after one of the forms of achondrogenesis) it is of the greatest importance for all necessary diagnostic/genetic studies to be done to allow this differentiation and specific counseling and to avoid having to use empiric recurrence risk figures, which, in a given case may over or under estimate the true risk.

Genetic risks were assessed in 3 studies of fetal and/or neonatal deaths: Poland and Lowry (1974) confined to stillborn infants; Gustavson and Jorulf (1976) on perinatal deaths (> 28 weeks gestational age to 7th postnatal day); and MacLeod et al (1977 & 1979) on stillbirths and early neonatal deaths. The results were remarkably similar in all 3 studies: overall 1/4 (131/511) of the stillbirths and perinatal deaths were found to have a grossly recognizable single or complex malformation with either a genetic cause or predisposition, many of them associated with a significant recurrence risk.

Poland and Lowry (1974) studied 204 stillborn infants and found 55 to be morphologically abnormal. Twenty-six (47%) of the abnormal infants were found to have a genetically caused or predisposed defect, of which 3 were chromosomal and 23 non-chromosomal in origin. The later included 15 cases with a primary defect of the central nervous system. Poland and Lowry also studied 902 abortuses, over half (53%) of which were morphologically abnormal. In 83 (17%) of these a genetic cause could be determined. This cause was chromosomal in 23 cases.

In the Gustavson and Jorulf study (1976) 15 of 99 late stillbirths had one or more malformation of which 5 were primary defects of the central nervous system, mostly anencephaly. Two had multiple skeletal defects, one a cardiac defect, two gastrointestinal anomalies, and the other 5 had a multiple congenital anomalies syndrome, *all* with associated skeletal defects. All 15 malformations were considered to be multifactorially determined with a 1 in 20 estimated risk of recurrence in subsequent pregnancies of the same couple. Thirty-eight of 108 infants dying during the first week of life had at least one major malformation, 2 due to a chromosome defect, one representing the effect of a teratogen (phenytoin), 9 due to autosomal recessive mutations, two due to dominant genes(one new mutation, and 24 were multifactorial traits.

MacLeod et al (1977 and 1979) studied 100 fetuses. The authors found that 23 had a multiple congenital anomaly (MCA) syndrome, 3 due to chromosomal cause and 18 representing a recognizable syndrome. The risk of recurrence was considered "high" (2-25%) in 11 of the 23 MCA cases. MacLeod et al concluded that about 20% of stillbirth and perinatal death is associated with recognizable heritable disease.

Thus, in these studies, about 1/2 of abortuses are malformed; in 15-20% a genetic cause can be identified (about 1/4 representing chromosome defects). In the perinatally dead about 1/4 are malformed and in some 13% a genetic cause can be identified (about 1/8 representing chromosomally determined defects, the rest being gene mutations and multifactorial traits). Thus, the overall empiric recurrence risk for malformation in stillbirths is higher than in early abortuses. Again, a proper work-up is essential if recurrence risks are to be calculated.

ABNORMAL LIVEBIRTHS AFTER SPONTANEOUS ABORTION OR PREMATURE BIRTH

In 1976 Funderburk et al analysed data from 28,958 consecutive Los Angeles deliveries to determine the prognosis of future pregnancies after previous abortions *and* premature births. Perinatal mortality was more than 3 times as high among infants of women who had had at least one previous premature delivery and one spontaneous abortion that it was in the control group; among those who had had 3 or more previous premature deliveries the perinatal mortality approached 18%. These authors used the term "abnormal live birth" to designate infants with birth weight <2501 gm, a gestational age <37 weeks, or with congenital anomalies. They found that the probability of abnormal live birth increased strikingly with the number of previous abortions and premature births; the rate was 50% for women who had had at least 3 previous premature births. However, the incidence of recognized congenital malformations was not striking. Thus, even a history of previous *prematurity* coupled with the occurrence of spontaneous abortions increases the risk of fetal abnormality.

Adequate study of the products of fetal wastage provides diagnostic information that is vitally important in the identification of high risk parents, so that counseling can be given, prenatal diagnosis offered, and where possible, preventive measures taken.

PSYCHOLOGICAL ASPECTS

The above was written and documented in some detail because so many professionals seem not to know or to care about the biological aspects of the matter. Many seem to know and to care even less about the psychological aspects of abortion and stillbirth, and it must be stressed that this dimension of the problem is equally important and deserves the most sensitive response from all professionals involved.

British psychiatrists (especially Emanuel Lewis and S. Bourne) have been very active in the field and their several seminal contributions have been most helpful. Their thinking was summed up in the Lancet Leader of 4 June 1977 entitled "The Abhorrence of Stillbirth.": "The stillbirth of a baby who was awaited with joy is a bitter calamity. Intrapartum death is saddening to everybody involved; worse, death in utero is extraordinarily chilling and repugnant; but beyond that, there is now a growing suspicion of sequelae beyond and different from any immediate painful reactions: psychiatrists will bear witness that, in the mother, the wound to self-respect can precipitate depression, frigidity, and phobic states; some women, apparently untouched at the time, may be at increased risk of breakdown in the next pregnancy; there may be matrimonial disturbances, impotence, and other symptoms in the husband and far reaching effects on other children."

The entire Leader deserves to be quoted here, however, readers are referred to an excellent, comprehensive review of the entire literature which was recently prepared on the subject by Sean Phipps, Coordinator of the Genetics and Birth Defects Clinic of the Milwaukee Children's Hospital: Stillbirth and neonatal death; mourning response, intervention and management. Copies of the preprint are available from him. The review was stimulated through contact with the local parent group called AIID (Aid in Infant Death) and the organization by J. Herrmann and S. Phipps at the Milwaukee Children's Hospital of an exemplary team to provide diagnostic and psychological counseling services to parents of stillborn infants. From Emanuel Lewis they have adopted a stunningly beautiful "logo" for their work, namely the Chinese characters for a plant whose flowers appear only once briefly during the night, a poignantly apt symbol of stillbirth (Fig. 1). According to the Curator of the Mitchell Park Horticultural Domes of Milwaukee the flower refered to is a type of night-blooming cereus (Fig. 2) which must mean a rather recent investing of the plant with this meaning since no cacti are native to Asia.

A recent sensitive discussion of the subject of stillbirth and its psychological implications is by Kennel and Klaus in their textbook on mother-infant bonding (Klaus and Kennell, 1976).

SUMMARY

Humans sustain a reproductive loss of about 2/3; prenatally, much of this death is associated with malformations which are mainly due to chromosome abnormalities. Up to one-half of all pre and post implantation ova in man may have chromosome defects which are over 98% lethal. The earlier the stage of development at the time of the spontaneous abortion the greater is the number of malformations and chromosome defects; almost 80% of embryos having reached a 2 week stage of development have a chromosome defect, as do over 60% of those developing to 12 weeks, about 6% of stillborn infants and 0.6% of all liveborn infants. Even nonchromosomally caused single congenital defects have a high prenatal death rate. Besides chromosome defects, multifactorial traits and single gene (mendelian) mutations are the next most common class of congenital defects. Prior fetal wastage with or without prematurity of previous liveborn infants increases the risk of subsequent fetal loss; the greater the number of preceding spontaneous abortions the smaller is the chance of a subsequent liveborn child.

One-fourth of all stillborn fetuses have one or more than one malformation or a syndrome, in many cases associated with a substantial risk of recurrence. After "certain diseases of early infancy" (mostly prematurity and hyaline membrane disease) congenital malformations remain the most important cause of infant mortality (60% of which occurs by the seventh day of life).

It is important for pediatricians to take much greater cognizance of the amount of genetic disease involved in fetal wastage and infant death, to collaborate more effectively with obstetricians, pathologists, anatomists and geneticists in determining diagnosis and risk of recurrence, and to counsel more accurately those who have lost a fetus or infant. Such fetuses and infants deserve the same meticulous examination, evaluation and documentation as an older malformed child being brought in for diagnostic, prognostic and genetic counseling. A fetal loss may cause as much sorrow as an infant death; this grief must be addressed explicitly but gently and sympathetically before any other considerations are put before the parents as they decide on whether or not to create a new life.

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TABLE I

Infant Mortality in Wisconsin 1975

	Period		Cumulative		
	N	%	N	%	Period
First 24 hours	332	38.8	332	38.8	day 1
Day 2 - day 7	188	22.0	520	60.8	≤day 7
Day 8 - day 28	97	11.3	617	72.2	≤day 28
Day 29 - end of first year	238	27.9	855	100.0	≤1st year
	855	100.0			

TABLE 2

Prenatal and Infancy Loss and Chromosome Abnormalities in Humans

			Lost			Remaining		Chromosome Defects	
	n	%	n	% of total	% of remainder	n	%	Rate	Total %
Initial Ova	214	100							
A. Non dividing ova			34	16	-	180	84	0.82	25.4
B. Preimplantation loss			32	15	17.8	148	69		
C. Early implantation loss			47	22	31.7	101	47.2	0.783	17.23
FIRST MISSED PERIOD									
D. Abortion <20 weeks			25	11.7	25.0	76	35.5	0.621	7.26
E. Stillbirth >20 weeks			0.608	0.28	0.8	75.4	35.2	0.058	0.016
F. Livebirths						75.4	35.2	0.006	0.027
G. Infant deaths (≤1 yr)			1.0	0.46	1.3	74.4	34.8		
H. Totals			139.6	65.2		74.4	34.8		~ 50%

TABLE 3

Frequency of Chromosome Defects as a Function of Developmental Age

(Boué & Boué, 1973)

Development in Weeks	No of Specimens	Chromosome Anomalies			
		No	%		
2	23	18	78.3	66%	62%
3	374	258	68.9		
4	203	125	61.6		
5	139	85	61.2		
6	302	211	69.9		
7	56	27	48.2		
8	36	8	$\frac{25}{108}$ = 23%		
9	42	6			
10	14	7			
11	8	1			
12	8	3			

TABLE 4

Chromosomal Abnormalities in Liveborn Infants

(Jacobs 1977)

	No	% of Total
NORMAL	54,423	99.4
ABNORMAL	326	0.6
TOTAL	54,749	100.0

Type of Abnormality		No	% of Total
Sex chromosome aneuploidy (88 males, 32 females)		120	0.22
Autosomal trisomy		74	0.14
Structural defects			
balanced	104	132	0.24
unbalanced	28		
		326	0.60

TABLE 5

Chromosome Abnormalities in the Perinatally Dead

(Bauld et al 1974, Machin & Crolla 1974, Kuleshov et al 1975)

Time of Death	Successfully Cultured	Abnormal	
		No	%
Antepartum, usually macerated stillbirth	59	7	11.9
Intrapartum death "fresh stillbirth"	215	9	4.2
Early neonatal death	519	32	6.2
Total	793	48	6.1

TABLE 6

Cause of Death and Chromosome Abnormalities in the Perinatally Dead

(Bauld et al 1974, Machin & Crolla 1974)

Cause	Successfully Cultured	Abnormal	
		No	%
Multiple congenital anomalies, lethal malformation	174	15	8.6
Infection	43	3	7.0
Antepartum death & stillbirth without malformations	29	2	6.9
Complications of prematurity	177	5	2.8
Primary anoxia ± trauma	171	2	1.2
Other	25	0	0.0
	619	27	4.4

TABLE 8

Subsequent pregnancy Outcome in 472 women who had had at least one Previous Abortion

(Poland et al 1977)

Pregnancy outcome	No	%
Live-born infant	412	64.6
Spontaneous abortion	140	22.1
Stillborn infant	7	1.1
Neonatal death	11	1.7
Ectopic pregnancy	4*	0.6
Therapeutic or induced abortion	49*	7.7
Unknown or currently pregnant	15*	2.4
	638	100.2

---

* Eliminated from subsequent consideration

TABLE 9

Outcome of Subsequent Pregnancy According to Group

(Poland et al 1977)

Group	Total Pregnancies	Live Births	Spontaneous Abortions	Perinatal Loss	Total Pregnancy Loss %
		Outcome (%)			
1	192	81	17	2	19
2	182	77	21	2	23
3	126	63	30	7	37
4	63	51	46	3	49

TABLE 10

Pregnancy Outcome Related to Number of Previous Consecutive Abortions

(Poland et al, 1977)

Number of Consecutive Spontaneous Abortions	Total Cases	Outcome (%)		
		Live Births	Spontaneous Abortions	Perinatal Loss
1	145	79	19	3
2	26	65	35*	
3	30	50	47*	3
Total	201			

---

*Figures almost identical to those quoted by Leridon

TABLE 11

Risk to Later Sibs of Stillborn Fetuses

(Newcombe, 1968)

	Among all Births 217,795 Live & Stillbirths		After 1 Stillbirth: among 1265 later Sibs		After 2 Stillbirths: among 35 later Sibs	
	No	%	No	%	No	%
Stillbirths	2,403	1.1	85	6.7	5	14.3
Handicapped	3,987	1.8	29	2.3	0	--
Dead	8,437	3.9	81	6.4	7	20.0
Totals	14,827	6.8	195	15.4	12	34.0

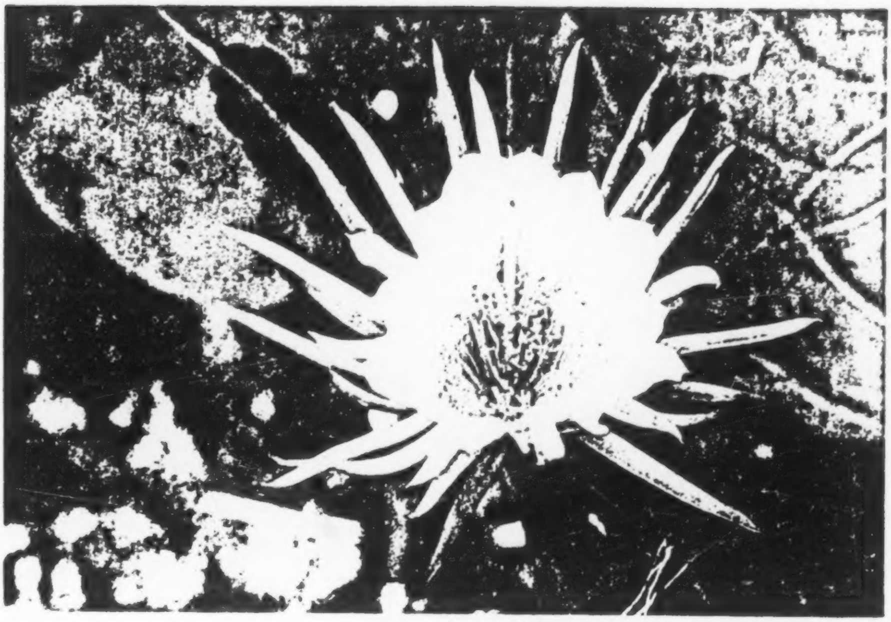
LEGENDS

Fig. 1 Four character Chinese construction (read from top) TAN HUA ONCE TO APPEAR. HUA meaning flower, and the character TAN being a combination of the characters for Sun, rain and cloud. Chinese symbol for stillbirth. In her second book (China Men)-Maxine Hong Kingston alludes to this symbol: "Sun, air, wind chase away his memory of nightingales singing and night-blooming cereus." (New York, Alfred A. Knopf. 1980, p.8).

Fig. 2 The flower of the HUA character is the night-blooming cerus (*epiphylum oxypetalum*).

Fig. 1 & 2 Courtesy of Sean Phipps of the Milwaukee Children's Hospital.

墨花一現



Yale University New Haven, Connecticut 06510

SCHOOL OF MEDICINE
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Department of Pediatrics
Telephone (203) 436-0316

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

Thank you for giving me the opportunity to comment on S. 158, "A bill to provide that human life shall be deemed to exist from conception." It is my belief that although the potential for human personhood is present in every diploid cell of a body including the fertilized zygote, those unique characteristics of which constitute human personhood do not develop until considerably later than conception. It is possible to find all of the human chromosomes and genes in any single diploid human cell, but this does not establish "human personhood" in my opinion. Attempts to define this concept, I believe, are the province of philosophers rather than scientists and physicians.

I would specifically like to address the question of the impact of S. 158 on my practice as a Pediatric Hematologist. I care for children with genetically determined blood diseases which impose enormous emotional and financial drains upon families. Cooley's Anemia is a genetic disease which still has approximately 25 year life expectancy. It has received Congressional attention in the past. These unfortunate children must receive transfusions of blood on the average of every three to four weeks and ultimately succumb in young adult life to the consequences of chronic iron overload. The parents of such children usually opt to have no more children because of the tremendous burden that an affected child imposes. The option of prenatal diagnosis and elective abortion of fetuses proven to have this disease has provided some of these families with an important alternative. I have patients who now have normal siblings who would never have been conceived if this had not been an option. The same problems and possibilities obtain in Sickle Cell Anemia.

We have recently able been able to exclude a diagnosis of congenital agranulocytosis in a 16 week fetus. The horror of this genetic disease in a previous child resulted in one-and-a-half years of painful hospitalization before certain death. Another pregnancy would never have been undertaken without the firm knowledge that the child would not be affected. The family now has a beautiful and healthy six month old.

I believe it would be useful in your deliberations to talk to families who have had these kinds of experiences. Those of us "on the firing line" are concerned about S. 158. Families who have been blighted by catastrophic genetic disease should not be deprived summarily of their right to have normal children.

I personally object to the intent and content of S. 158 and urge you to consider its detrimental impact on many courageous families in your decision making process.

Sincerely,

H A Pearson

Howard A. Pearson, M.D.
Professor and Chairman

HAP/aa

UNIVERSITY OF WISCONSIN
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MOJMIR S. SONEK, M.D.

ENDOCRINOLOGY-INFERTILITY
263-1217 OR 263-1218
RAY V. HANING, JR., M.D.
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267-6099
LUIS B. CURET, M.D.
PERRY A. HENDERSON, M.D.
RONALD W. OLSON, M.D.
DAVID B. SCHWARTZ, M.D.

April 24, 1981

Honorable Max Bacus
Ranking Minority Member
Subcommittee on Separation
 of Powers
U.S. Senate
Washington, D.C. 20510

Dear Senator Bacus:

Quite clearly the bill S. 158 confuses the question of "life" with "human being" or "legal person" which is simply mixing apples and oranges.

Life can be seen all around us and clearly humans sperm are living but no one would declare them to be persons. When one of these sperms unites with a human ovum whether within the body or outside of it there is no scientific way to define the legal rights and human personhood of the resulting fertilized ovum. There would be no way to set up according to scientific method any study either medical or otherwise which would provide significant data or answers to this question.

Clearly then it is my view that the question of human personhood is largely a moral, ethical, philosophical, religious and perhaps a political question which is not amendable to scientific definition or even study in the present context.

Sincerely,

BM Peckham

Ben M. Peckham, M.D.
Chairman

BMP:me

1981 APR 27 AM 9 08

1981 JUN 14 AM 10 45

The University of Texas
Health Science Center at San Antonio
7703 Floyd Curl Drive
San Antonio, Texas 78284

Medical School
Department of Pediatrics

June 11, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In reference to your letter of May 13, 1981 to Dr. Marilyn Escobedo, regarding Bill S. 158. Dr. Escobedo is out of state at this time and her reply to your letter will be forth coming after the week of June 22nd.

Thank you for your letter of interest and understanding of our delay in replying.

Sincerely yours,

Kay Petru

KAY E. PETRU
Administrative Secretary
Dept. of Pediatrics/Neonatology

Ronald J. Pion, M.D., F.A.C.O.G.
Psychophysiologic Dysfunctions

April 27, 1981

Senator Max Baucus
United State Senate
Washington, DC 20510

1981 MAY -1 AM 9:57

Dear Senator Baucus:

Your letter of 16 April reached me on Friday. We have returned to the Los Angeles area. I do appreciate the opportnity of sharing some thoughts with you and your colleagues.

I do not believe that 'the question of personhood is a medical and scientific' one, only! Furthermore, it is my point of view that the question of 'human personhood is in large part, a moral, ethical, philosophical, religious and political' one !

I do agree that 'medical and scientific data alone cannot determine what the definition of human personhood should be in the present context'.

Were the committee to consider seriously the recommendation for passage of S.158, I would deem it appropriate to file an 'impact statement', documenting the consequences in money expenditure, and psychosocial turmoil (at the very least) that might occur.

The committee might also look at the ways of reducing the number of 'misconceptions' that arise each year, so that more of our citizens have an opportunity of avoiding pregnancy, rather than 'arguing' whether there 'should be over riding rights granted to the unborn.

Respectfully submitted,

Ronald J Pion

Ronald J. Pion, MD
Clinical Professor of
Obstetrics and Gynecology, UCLA

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The University of Iowa
Iowa City, Iowa 52242

The University of Iowa Hospitals and Clinics
Department of Obstetrics and Gynecology
Office of the Chairman

(319) 356-1976
If no answer, 356-1616

May 27, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I write in reply to your recent letter asking my opinion of S.158. I will respond to the four questions you posed.

1. I do not believe that "the question of human personhood" is a medical or scientific question.

2. I do agree that the question of human personhood is in large part one relating to matters of morals, ethics, philosophy, religion or politics, rather than one relating to biomedical matters.

3. I do not believe that medical and scientific data alone can be used to determine the definition of human personhood.

4. It is my opinion that if S.158 were enacted, the results would be--in a word--disastrous. As I interpret the bill, it would *absolutely* prohibit abortion for any reason, even where necessary to preserve the life of the pregnant woman, in cases of rape and incest, and where it is known with medical certainty that the fetus is afflicted with a congenital defect incompatible with normal life. Additionally, and perhaps even more preniciously, it would have far-reaching effects on the practice of medicine. For example, it would seem to prohibit the use of certain widely used and widely accepted forms of contraception. A case in point is the intrauterine contraceptive device which is believed to act in such a way as to inhibit *implantation*, as opposed to preventing *conception*. Another case in point is the progesterone "mini pill" which may act in a similar manner. Finally, the bill could be interpreted in some perverse way

as prohibiting treatment of extrauterine pregnancy, a serious and life-threatening complication which occurs approximately once in every 200 gestations. If a pregnancy were located in the fallopian tube (the most common sight of extrauterine pregnancy) and it is not treated surgically, the almost-inevitable result would be death from intraperitoneal hemorrhage.

These opinions are expressed by me as an individual and do not necessarily reflect the institution or any organizations with which I am associated.

Please do not hesitate to contact me if I may be of further help.

Sincerely yours,

Roy M. Pitkin

Roy M. Pitkin, M.D.

RMP:njs

STATE UNIVERSITY
OF NEW YORK
DOWNSTATE MEDICAL CENTER

• DEPARTMENT OF MEDICINE

June 11, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am delighted to try to respond to your letter of May 13th which was received in Brooklyn on June 5th.

The subject matter brought up by S.158 is of extreme importance.

I am concerned by your use of the word "human personhood" since I am not quite clear what it means.

Let me respond with some general remarks and then answer your questions.

A living cell is not a human being, though humans are made up of living and dying cells. There is a continuum between living and non-living and any sharp distinctive line between the two is exceedingly difficult for scientist or humanist.

Science can say with some difficulty whether there is life or not. It has finally agreed that flat electro-encephalograms means brain death.

But the quality of life is of supreme importance as in patients with terminal cancer or heart disease, or some of the congentital diseases such as Tay-Sachs, where life on the available dimensions is not worth living to the patient or the family.

Then there is the very important element of choice. The mother with a monster in her belly might well want to have it scraped out and start again. The mother with an unwanted baby from rape, incest, or the indiscretions of youth must be allowed the same choice. The person with terminal cancer must not be denied his choice to blow the whistle on how many more palliative procedures will be performed.

To respond to your specific questions:

1. Human "personhood" is much more than a medical or scientific question. Fertilized ova are not yet humans.

2. The question of human personhood is very much a matter of moral, ethical, religious, humanistic and cultural considerations.

3. Medical and scientific data cannot alone determine human personhood.

4. The impact of S.158 would be simply disastrous. There could be no enlightened genetic screening, and there would be no clearly considered and perfomed abortions. (There would be no effect on contraceptives.)

Senate bill S. 158 is very much a governmental intrusion on the rights of private citizens.

With all best wishes.

Sincerely,

Calvin Plimpton

Calvin H. Plimpton, M.D.
Professor of Medicine
Emeritus President and Dean
Downstate Medical Center

CHP:r

EASTERN VIRGINIA MEDICAL AUTHORITY · 1964 ·

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28 May 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
UNITED STATES SENATE
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your letter concerning your subcommittee's hearing on S. 158.

I know of no medical or scientific evidence that either defines human "personhood" or indicates when a developing embryo is imbued with that quality. To argue this question on medical and scientific grounds is pointless and is reminiscent of the philosophers of old in their endless arguments about how many angels can dance on the head of a pin. It is in every sense of the word an ethical and religious issue, and to attempt to legislate it is to legislate our moral and religious beliefs.

From a more pragmatic point of view, the enactment of S. 158 would have devastating effects on the practice of medicine, would cause needless suffering and even the loss of life, life the definition of which we are all agreed upon. Being a pediatrician, I am most concerned about the effect this law would have on genetic screening. As I am sure you are aware, this is an area that is rapidly expanding. It offers couples who carry certain severe genetic disorders the opportunity to be assured that the wife will bear a normal child. Inherent in this is the recognition of the genetic disorder in utero and an interruption to that pregnancy if the fetus is affected. To deny couples that opportunity seems to me to be unduly restrictive. There are many other examples that I could use, particularly as related to the practice of obstetrics and gynecology. However, there are others who are more qualified to comment.

I hope that you agree with my views and I am convinced that this legislation is oppressive, pernicious, and dangerous.

If there is any other information that I might provide, or in any other way contribute to the defeat of this bill, please do not hesitate to let me know.

With best wishes.

Sincerely yours,

F. Stanley Potter, M.D.

F. Stanley Potter, M.D.
Professor and Chairman
FSP:bw

21 May 1981
120 Montclair Circle
Durham, North Carolina 27713

Senator Max Baucus
Room 107
Dirkson Senate Building
Washington, DC 20510

Dear Senator Baucus:

I am writing as a private individual who has accumulated experience that may be relevant to the technical and administrative aspects of the Senate Committee hearings on "human life". I am an obstetrician who trained and practiced in Britain, then earned a PhD in embryology and conducted research in that field for several years. I was the Medical Director of the International Planned Parenthood Federation for ten years and traveled to all parts of the world before assuming my current responsibilities as Executive Director of the International Fertility Research Program, which is an independent nonprofit organization conducting research in a variety of contraceptive technologies. I present my credentials briefly only to set out what I believe is an appropriate context for your review. I do not speak as the representative of any organization, but as an individual with a deep sense of personal concern about an important human problem.

For more than 20 years, my daily work has demanded that I think about the important and complex problem of defining when human life begins. In all that time, I have never been able to identify any obvious rubicon in development that will allow me, or society, to establish simple, universally acceptable rules to guard all aspects of human reproduction. At the same time, I recognize the need for responsible action. Just as I believe that I have a moral obligation to help protect patients' ovaries or testes from undue exposure to x-rays, so I have a concern for the products of conception once fertilization has taken place.

Fertilization does bring together genetic material but I do not believe it forms an appropriate point for legislative concern or individual action for the following reasons:

- Some fertilized eggs will become cancers (choriocarcinomas), or merely masses of placental tissue (hydatidiform moles).

- Up to 50% of all fertilized human eggs are aborted spontaneously due to defects in the complex processes of embryology.

- In mammals, development can take place without fertilization, until the somite stage (equivalent to 20-25 days of development in man).

- Two or more embryos can come together to make a common embryo or chimera. In the natural situation, the formation of identical twins does not begin in man until about the 14th day of pregnancy. This is a physical fact of considerable significance for the spiritual interpreation of the human soul.

I continue to be impressed by the massive production of millions of eggs and sperm. More than this, I am impressed by the frequent abnormalities of development and the way in which spontaneous abortion acts as a necessary, healing process eliminating Nature's errors.

I expect biologists to provide increasingly detailed accounts of the anatomy and physiology of early human development; however, on philosophical grounds I do not expect to see a concensus concerning the metaphysical problem of defining an exact point when life begins anymore than I expect astronomers to tell me about heaven by looking down a telescope.

Problems of the same nature occur elsewhere in biology. The parallel I sometimes make relates to the age of voting in a democratic society. No one would argue that the frnachise ought to extend to a child of six months, or that it should be withheld until an individual is 60 years old. But whether one votes at 18, 21, or 30 is ultimately an arbitrary decision. People who make such difficult decisions must have as much information as possible, must ensure that compassion is extended when error occurs, and must make every effort to see that tolerance reigns when sincere differences of opinion arise.

Biologically, one of the main actions of an IUD probably takes place after fertilization and before implantation five days later. Legally, an IUD could be classified as an abortifacient but I do not think that clinically or ethically the use of an IUD in any way equates with an abortion later in pregnancy.

Just as nature frequently intervenes early in pregnancy to cure abnormal situations, so I believe it is licit to do so of our own volition in certain circumstances. At the same time, I find any thought of infanticide abhorrent. Somewhere between the two extremes we need to draw a line. Personally, I would draw it to ten or twelve weeks, but I can respect the competent and informed individual who draws the line at six, or at twenty-six weeks. I do not find any significant body of informed and thinking people who want to push the line all the way back to fertilization or all the way forward to birth.

As a member of a democracy, I respect the right of my elected leaders to make decisions concerning abortion. In my responsibilities toward the organization I direct, I ensure that both the letter and the spirit of all congressional laws concerning abortion-related research are fully and openly implemented. However, I think the current congressional debate is concerned with spiritual rather than physical judgments and I believe that the government of any country that upholds the separation of church and state should not engage in such a debate. I am concerned about the secondary consequences of a decision that defines fertilization as the time when human life begins. Should this happen, both those who had agreed with the original hypotheses and those who had opposed it will unite in regret. For example:

- It is likely that both oral contraceptives and IUDs would be excluded from medical practice in the United States. There is strong evidence that one of the major effects of an IUD occurs after fertilization. There also is evidence to indicate that some women who use the pill do indeed ovulate, but still do not fall pregnant. In these cases it is likely that the exogenous hormones so alter the lining of the endometrium to make it possible for fertilized eggs to implant.

- Even if some methods of contraception remain in use, I think that the amendment will curtail almost all future research in the field of fertility regulation. Drug companies will withdraw because any new methods might well be interpreted as abortifacient thus exposing the industry to medico-legal problems and to general harassments by the small minority who feel passionately about the subject.

- Nonprofit organizations will be squeezed out of the field. Whenever an ambiguity arises concerning the frontier of abortion and contraception, federal funds will undoubtedly be withdrawn. The cost of contraceptive research and development have now become so high that no philanthropic organization, or consortium of organizations, could possibly carry them. Furthermore, all large organizations are sensitive to expressions to public opinion. (For example, the Kellogg Foundation has recently withdrawn from any funding of family planning servies.)

We do have one recent historical parallel for a modern state that suddenly outlawed abortion and made contraceptives much more difficult to obtain. The law in Rumania was changed in 1966/67. Nine months later the birthrate had tripled from 13.3 per thousand to 39.9 per thousand, creating a generation of social and economic problems from school intake, and university placement to employment opportunities. However, during every year since the increase, the birthrate has fallen due to increased number of illegal abortions. The illegal abortions probably are done later in pregnancy than the legal abortion's procedure previously (which I find ethically offensive) and the number of women dying from abortion has quadrupled.

In America, I am sure we would experience a prohibition type era with what might be called abortion "speak-easies". There will be gross financial and probably sexual exploitation of women. No doubt the organized crime would move in. I believe the number of embryos that would be destroyed would be almost the same as the present time, although the abortions would probably happen later in pregnancy because of difficulty of access to services. Certainly, the number of women will die as a result of illegal abortions, as will the suffering of many children and families. I sincerely believe that a loss of human dignity and human life will increase and not decrease and which I find morally, spiritually and biologically unacceptable.

In the words of the New Testament, we would have cast out one devil to let seven more in.

Sincerely,

Malcolm Potts

Malcolm Potts, MA., MB., BChir., PhD. D.ObsRCOG

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DEPARTMENT OF PEDIATRICS
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Richard A. Insel, M.D.
Marilyn R. Loeb, Ph.D.
Keith R. Powell, M.D.
David H. Smith, M.D.

1981 JUN 11 AM 9 28

June 8, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Senate Office Building
Washington, D.C. 20510

Re: Bill #S.158

Dear Senator Baucus:

As a father and pediatrician I am an advocate for children. The question of when "human personhood" begins lies more in the realm of social than biologic science. Science goes only so far as to state than when a human ovum is fertilized conception has occurred.

"Human personhood" is at best a vague concept which can be discussed philosophically, ethically, religiously and even politically but not scientifically. A person who has conceived must have the right to reflect on the total impact of the conception not only as it involves the individual but also as the effects on the conceptus is perceived.

I therefore feel quite strongly that S. 158 should not be enacted.

Sincerely,

Keith R Powell

Keith R. Powell, M.D.
Assistant Professor of Pediatrics

KRP/mlh

April 17, 1981

Senator Max Baucus
Ranking Minority Member
Senate Judiciary Sub-Committee on Separation of Powers
1107 Dirkson Senate Office Building
Washington, D.C. 20510

Dear Senator:

I am Dr. Joseph H. Pratt, Emeritus Professor of Surgery of the Mayo Medical School and Retired Gynecologic Surgeon of the Mayo Clinic. I was on the surgical staff of the Mayo Clinic from 1945 to my retirement in 1977. My principal interest and the basis of most of the papers I have written has been gynecologic surgery. I was the senior gynecologic surgeon and worked at the Methodist Hospital (as opposed to St. Mary's Hospital) and, therefore, consulted on and did whatever abortions were deemed necessary for our patients.

I feel strongly that the proposed "Human Life" statute should be turned down by this committee. When a sperm joins with an ova another event in the continuation of the human species is initiated. However, this fertilized egg or this small group of cells is a long, long way from being a "person". In Dr. Conner's words on looking through his microscope, "I see no heaven bound chariot of the soul, but only a frail congeries of animal cells, frought indeed with promise beyond all other embryonic creatures, but of necessity bound to grow and to organize itself as an animal if it is to become man."

It is obvious that science cannot answer the question of when human life, in the sense of a human being or a person comes into existence. That is a question which is fundamentally one for theologians and moralists to debate. As a physician I had to have some ethical tenets from which I could work or discuss problems, especially those involving the medical and emotional decisions required by the termination of a pregnancy.

For myself, as a person who would be asked to do an abortion, I have accepted the premise that a fetus is a part of the woman, a parasite if you will, but an integral part of the woman's body, also that a woman has the right to make decisions concerning her body. Once the fetus has grown and organized itself to the stage that it survives outside the body then we can reasonably say another individual has developed.

I hope you will consider these thoughts in the discussions of the committee and that this letter will be made part of the record on your deliberations.

Sincerely,

JHPratt

Joseph H. Pratt, M.D.

JHP:ds

cc Senator David Durenberger
Senator Arlen Erdahl

Loma Linda University
A Seventh-day Adventist Institution

Division of Religion
La Sierra Campus — 714/785-2041
Loma Linda Campus — 714/796-7311
Extension 2941

June 2, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Your letter of May 13 was referred to me since it relates to my area of specialized concern here at Loma Linda University's School of Medicine.

May I begin by answering your four questions, specifically:

1. While regard for human personhood has implications to medical practice and scientific investigation, the definition itself goes beyond merely medical and scientific considerations.

2. Human personhood by definition certainly involves moral, ethical, philosophical and religious considerations. I am less clear about its political implications.

3. Medical and scientific data can serve as indicators of the presence of actual and/or potential human personal function, but they cannot be the sole basis for the definition of personhood.

4. This law would impose on a pluralistic society belief structures that do not necessarily represent a consensus of society. It would limit the physician's ability to practice his art in those situations of competition between persons (the mother and her fetus) where one may endanger the quality of life of the other. It would limit access to therapy intended to supplement the body when it fails to spontaneously abort a grossly abnormal fetus. It would also limit the use of certain types of contraception since its definition does not take into account the fact that a fertilized ovum has no future potential if it is not in a supportive location (implantation in the uterus).

By defining the zygote as a person from the moment of conception, a theological premise not shared by all of us (the existence of a human soul) is arbitrarily imposed. This comes close to a violation of constitutional guarantees relating to religion.

On the other hand, protection of fetal life has important implications for a society's human sensitivities. Devaluation and depersonalization of fetuses is likely to diminish the value placed on human life in general. What is even "symbolically" human has potential attitudinal impact on our ability to value humanness. What is even marginally human has human claims upon us and must therefore be protected and respected—though not absolutely as in situations of competing claims. Abortions may be performed in situations of threat to the mother, but abortion must never become a trivial act. Laws should be so constructed as to assure this--on humane, not theological, grounds. This must be so if the support of the larger society is to be enlisted in establishing such legislation.

I find the present discussion very interesting and at time perplexing. I hope from your inquiry, regarding attitudes of medically involved individuals across the country, you may be able to be assisted in making a rational and wise decision regarding this matter.

Sincerely yours,

Jack W. Provonsha

Jack W. Provonsha, M.D., Ph.D.
Chairman
Department of Christian Ethics

lt

cc: Dr. G. Gordon Hadley

MAILING ADDRESS: 450 CLARKSON AVENUE, BROOKLYN, NEW YORK 11203 / PHONE: (212) 270-1000

April 29, 1981

Senator Max Baucus
United States Senate
Washington, D.C.   20510

Dear Senator Baucus:

In response to your letter of April 13, 1981 concerning Senate Bill 158, I have the following comments:

(1) The proposed legislation probably lacks a rational basis.

The apparent purpose of the legislation is to establish by congressional declaration that a human embryo and then fetus is a "person" within the meaning of the 14th amendment due process clause ("nor shall any state deprive any person of life, liberty, or property without due process of law") and is therefore entitled to due process protection from purposeful abortion at any time after conception. (Presumably such protection would extend to all embryos and fetuses, including those that are seriously malformed or conceived as a consequence of rape or incest.)

To achieve its purpose the legislation first declares that scientific evidence supports the likelihood that actual human life exists from conception; it then finds that the Fourteenth Amendment was intended to protect all human beings, and it finally asserts that "person shall include all human life as defined here." (Emphasis added.) The great leap from human life to human person is made by assertion with no explanation nor reference to supporting scientific evidence. And indeed responsible scientists would be loathe to give an authoritative opinion on the social question of when a human fetus should be considered a human person.

Although social problems cannot ordinarily be resolved effectively by resort to definitions, "actual human life" might appropriately be defined as existing from conception. At that point an organism exists which is capable of growth and which may ultimately develop into a human person. But the existence of human life at conception does not resolve the question of when the fetus becomes a person. A seed when planted in the ground may constitute "life," but it is not yet a flower. A freshly laid egg is not a chick. The meaning of "person" in the due process clause depends on the purpose of the clause. The clause protects from excessive governmental intrusion those individuals who are members of the American community, that is, individuals who have most of the characteristics of acknowledged community members. Such individuals are ordinarily recognizable as members of the community because they significantly resemble acknowledged community members and either function like various community members or have suffered an impairment of function other than a total and irreversible loss of self-awareness. In other words, they usually look and act like normal, or abnormal, young, adult, or old people. That description and the underlying purpose scarcely fit a human embryo in the early stages of development. (A similar kind of inquiry is required to identify the community-welfare purpose underlying anti-abortion laws. If the purpose is the traditional anti-homicide purpose, i.e., to inhibit the destruction of persons, that purpose may not be significantly implemented by application of such laws to human embryos in the early stage of development, and such application may therefore lack a rational basis.)

(2) Legislation declaring that a human person is present from the time of conception probably rests solely upon religious premises concerning an immortal soul and therefore may well violate the establishment of religion clause of the First Amendment.

(3) The attempt to identify a human fetus as a person within the meaning of the due process clause is contrary to the clear holding of the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). That interpretation is binding on Congress (see 4 below). The Court stated in Roe (410 U.S. at 156-57):

> The appellee...argue[s] that the fetus is a "person" within the...meaning of the Fourteenth Amendment....The Constitution does not define "person" in so many words....But in nearly all the instances [where the word is used in the Constitution] it has application only postnatally....All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer [than] today persuades us that the word "person" as used in the Fourteenth Amendment does not include the unborn.

(4) Congressional power to enact the proposed legislation cannot be derived from Section 5 of the Fourteenth Amendment. That section gives Congress "power to enforce" the provisions of the Amendment by appropriate legislation. Such power to enforce permits Congress by legislation to invalidate unconstitutional state policy, i.e., to supersede state policies that are inconsistent with the Amendment. But Congress is not authorized to validate state regula-

tion held unconstitutional by the Court. As stated in Katzenbach v. Morgan (384 U.S. 641 at 651 and footnote 10 (1966):

> Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment...Contrary to the suggestions of the dissent, section 5 does not grant Congress power to exercise discretion to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court."

Ever since Marbury v. Madison the Supreme Court has had the ultimate authority to interpret the Constitution. Congress may not disregard or overturn such interpretation. See Powell v. McCormick, 395 U.S. 486 (1969).

In Roe v. Wade the Supreme Court held: (1) the fetus is not a person within the meaning of the Fourteenth Amendment due process clause; (2) whenever "life" begins, the state interest in protecting fetal existence by proscribing abortion is not "compelling" prior to external fetal viability (at about 7 months), nor thereafter when the life or health of the mother is at stake, and therefore does not outweigh the mother's fundamental right to decide whether or not to bear a child. By stating that "we need not resolve the difficult question of when life begins" the Court indicated not that legislative resolution of the question would control the constitutionality of antiabortion laws but rather that resolution of the question was unnecessary to the constitutional determination: the state's interest in fetal existence prior to viability was held to be constitutionally subordinate to the mother's fundamental right regardless of when life begins. The proposed legislation is therefore beyond congressional power and meaningless.

By coincidence I will be in Washington on May 20th at the invitation of the Senate Subcommittee on the Constitution to testify concerning proposed legislation that would limit the jurisdiction of federal courts, including the appellate jurisdiction of the Supreme Court. Consequently, I will be available to consult or testify during a portion of that week should you so desire.

Sincerely,

Leonard G. Ratner

Leonard G. Ratner
Legion Lex Professor of Law

LGR:lrn

1300 YORK AVENUE, NEW YORK, N.Y. 10021
THE NEW YORK HOSPITAL-CORNELL MEDICAL CENTER

LIVINGSTON FARRAND PROFESSOR OF PUBLIC HEALTH
CORNELL UNIVERSITY MEDICAL COLLEGE

June 22, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am sorry that end of the academic year responsibilities prevented me from responding to your letter of May 13th until now. I have read S. 158 and believe that it is a foolish piece of legislation, perhaps unconstitutional. Human life certainly exists from the time of conception onward, but this is a separate matter from personhood. Unnumbered thousands of human eggs are fertilized each week and fail to develop into a human being. I do not believe that a fertilized egg can be considered to have personhood unless it is viable and able to grow to the point of being able to sustain itself outside the womb. If a fetus is too premature to survive, it cannot be considered a person.

In response to your specific questions:

1) I do not believe the question of human personhood in our present state of knowledge and technology is a medical or scientific question.

2) It is a philosophical question, if anything.

3) I believe that medical knowledge of viability of the fetus can be used to determine personhood.

4) If S. 158 is enacted it will make abortion and some forms of contraception a crime. Accordingly, people will seek the solution to the problems of unwanted pregnancies by going to underground sources for relief. There will be many women damaged or killed as a result, and this burden, as always, will fall heaviest on the poor and deprived.

Sincerely yours,

George G. Reader

George G. Reader, M.D.
Livingston Farrand Professor
of Public Health

GGR:af

08/ 399 620

THE UNIVERSITY OF KANSAS

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(316) 688-3180

June 8, 1981

Hon. Max Baucus
United States Senate
Judiciary Committee Subcommittee
Washington, D. C. 20510

Subject: S. 158

Dear Senator Baucus:

This is in response to your letter of May 13, 1981.

Question 1: Do you believe that the question of human personhood is a medical and scientific question?

Answer: No.

Question 2: Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

Answer: Qualified yes, although I am uncertain it can be politically decided for individuals.

Question 3: Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context?

Answer: No.

Question 4: What, in your judgment, would be the impact if S. 158 is enacted? On the practice of medicine; on genetic screening; on the use of contraceptives; other?

Answer: The enactment of S. 158 would be a travesty on women and upon the care of women and their children. The bill as proposed would make medical treatment of women during pregnancy almost impossible under fear of criminal indictment. It would theoretically prevent the removal of a life-threatening ectopic pregnancy. It would prevent the alternative management of genetic monsters and force them to suffer extrauterine until they inevitably died, a sentence imposition I cannot imagine from any compassionate human being.

June 8, 1981
Page -2-
Senator Max Baucus
Washington, D. C. 20510

It would prevent the use of many contraceptives. It would theoretically place the eating habits of pregnant women in legal jeopardy. Irrespective of my individual feelings regards abortion, the passage of this bill would be an atrocity.

Sincerely,

Daniel K. Roberts

Daniel K. Roberts, M.D., Ph.D.
Professor and Chairman
Professor, Department of Pathology
Chief, Ob-Gyn Service

DKR:rms

MCG

Medical College of Georgia
Augusta, Georgia 30901

School of Medicine
Department of Pediatrics

May 28, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter. In answer to your questions regarding abortion, I feel that the question of when human life begins is a philosophical or religious question. In my view, there is no way that medical and scientific data can determine the definition of the beginning of life. Any laws passed against abortion would have, as far as I am concerned, a tragic effect. As pediatricians, we see the results of abnormal pregnancies, unwanted children, and all the human miseries that unplanned, unmonitored pregnancies can bring. Therefore, I sincerely hope that this legislation will not pass.

Sincerely yours,

Alex. Robertson

Alex Robertson, M.D.
Professor and Chairman
Department of Pediatrics
Director of Neonatology

AFR:pk

NJH NAC
NATIONAL JEWISH HOSPITAL
AND RESEARCH CENTER
NATIONAL ASTHMA CENTER

[illegible]

THE INSTITUTE FOR RESPIRATORY AND IMMUNE DISEASES

1981 MAY 11 AM 10:26

May 4, 1981

The Honorable Max Baucus
United States Senate
Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Baucus:

I should like strongly to associate myself with the comments of Dr. Leon Rosenberg in testimony before your Committee to the effect that the question of "when does human life begin" is not a scientific but a religious or philosophical one. The operative word here is "human," and there are no scientific data which address this.

One must, of course, wonder why those who feel so strongly about taking "human" life are so silent about capital punishment, gun control or war, the victims of which most would define as human.

Sincerely,

Arthur Robinson

Arthur Robinson, M.D.
Professor of Biochemistry, Biophysics
and Genetics and Professor of Pediatrics
University of Colorado School of Medicine
and
Vice President for Professional Services
National Jewish Hospital and Research Center

AR:jc

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Department of Obstetrics and Gynecology

1981 JUN -4 AM 11

June 1, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am in receipt of your letter of May 13, 1981 concerning Senate Bill 158.

The questions you pose are difficult to answer and of course reflect a matter of personal opinion entirely. The first three questions are all very similar and I don't feel can be answered directly. It is my view that the existence of "human personhood" is not something that can be legislated and is certainly not a political question. Actually, I don't believe that the beginning of "human personhood" should be decided on any of the grounds that you list. Each person should be allowed to make his own judgment based on the framework of his personal code, his past experience, and his philosophic persuasions.

As far as question four is concerned, Senate Bill 158 is sufficiently vague that I think that it would primarily impact on the abortion situation. I can't see how it could seriously affect contraceptive matters and I think the question of genetic screening and counselling is one that could be handled by means of adequate due process.

I would like to emphasize that I strongly believe that it is not the place of the legislature or of legislation to define human personhood, no matter how such definition is arrived at. I hope that the Senate has the wisdom to defeat Bill S. 158 soundly.

Sincerely,

JW Roddick Jr

J.W. Roddick, Jr., M.D.
Professor and Chairman

JWR/lj

CHKD
Children's Hospital of The King's Daughters

June 2,1981

United States Senator Max Baucus
Ranking Minority Member
Sub Committee on Separation of Powers

Dear Senator Baucus:

Dr. Stanley Porter, Chairman of the Department of Pediatrics of Eastern Virginia Medical School, has forwarded me a letter which you had written to him dated May 13,1981. I would like to reply to the various questions raised in your letter to the whole issue of Senate Bill S.158. The definition of when human life begins goes beyond any medical and scientific data. That definition is truly a religious, philosophical, ethical, moral and personal one. It is extremely unfortunate that the definition has now become a political question. The impact of S.158, if it were even constitutionally legal, would be devastating. Politically "sanctifying" the moment of conception is arbitrary. Not all religions, philosophers and ethicists agree that personhood begins at conception and therefore such legislation would mandate actions counter to the religious, philosophical, ethical and personal beliefs of many people. Aristotle believed that life begins at 40 days for male and 80 days for female infants (De anim. hist. vii 3). Thomas Aquinas believed personhood begins at 40 days (Summa Theologica, Part I, q.118). In Judaism the conceptus is not accorded the status of a person until it is born. (Exodus, Chapter 21, Verses 22-25, Tractate Arakin Chapter 1, Paragraph 4 and Talmud Tractate Oholat, Chapter 7, Paragraph 6). In Conservative Judaism as well the value of a woman's personhood takes precedence over the potential person she is carrying within her womb (Marital Relations, Birth Control and Abortion in Jewish Law by David M.Feldman, Schocken Books, 1968). And so forth.

The practice of Medicine would be greatly complicated. The morning after pill and the IUD would be impossible forms of contraception since they interfere with the conceptus. Other forms of contraception might also be found to be unacceptable. Genetic screening would be virtually impossible since the potential parents of a seriously malformed conceptus would not be allowed the alternative of abortion. The impact on the status of women would be extremely grave. The value of a woman's life would be subordinate to that of a nonperson. The risk of illegal abortion and the accompanying mortality and morbidity of women would be a sorry consequence.

Each person has the right to believe when and under what circumstances personhood begins. To legislate any one groups beliefs and desires upon those of others undermines the principle of the Constitution and counters everything that the United States of America has stood for.

Sincerely,

Reuben Rohn, M.D.
Director, Adolescent Medicine
and Endocrinology

RR/sb

cc: Senator Harry Byrd
Senator John Warner
Representative William Whitehurst

national society
of genetic
counselors, inc.
nsgc

1981 MAY 19 AM 9:40

May 14, 1981

Hon. Max Baucus
Senator, State of Montana
Dirksen Senate Office Building
Room #1107
Washington, D.C.

Dear Senator Baucus:

The National Society of Genetic Counselors, Inc., does not support S. 158, the bill that seeks to legislate a definition of when human life begins.

Section 1 of the bill states: "that present day scientific evidence indicates a significant likelihood that actual human life exists from conception". The Society disagrees with this statement for the following reasons.

One: There is no scientific evidence of when 'actual human life' begins. To claim that life begins at conception blurs the important distinction between 'actual' human life and 'potential' human life. Individuals, including scientists, have varying opinions and beliefs about this question. However, opinion and belief do not constitute scientific evidence.

Two: The question of when actual human life begins is religious and philosophic, not scientific. Since members of those disciplines are unable to arrive at a consensus, it is inappropriate for Congress to legislate an answer to this question.

Three: The implications of the proposed legislation are not in the best interests of the American people. For example, certain routinely used methods of birth control could be considered illegal under the language of the bill. In addition, the use of amniocentesis and other methods of prenatal diagnosis of severe, untreatable, and frequently fatal birth defects could be in jeopardy. These procedures are associated with a low but real risk of miscarriage. Therefore, physicians could be reluctant to employ them if by so doing they might be subject to criminal prosecution.

Four: The intent of the proposed legislation is to make abortion illegal. The central question is: "Do women and couples have the right to make their own reproductive decisions?". The U.S. Supreme Court has ruled in the affirmative in Roe vs. Wade. The U.S. Constitution provides for the separation of powers, and gives the Supreme Court the right to interpret the Constitution. If Congress wishes to override this Court decision, it can pass a constitutional amendment that bans abortion. This approach would allow for full societal debate of the relevant moral and social issues.

The National Society of Genetic Counselors, Inc., represents genetic counselors throughout the United States. For the reasons cited above, we are opposed to S. 158.

Respectfully submitted,

Beverly R. Rollnick

Beverly R. Rollnick, M.S., Ph.D.
President

Director, Genetic Counseling
Assistant Professor Pediatrics-Genetics
Center for Craniofacial Anomalies
University of Illinois Medical Center
P.O. Box 6998
Chicago, Illinois 60680

cc: Senator John P. East
Ann C.M. Smith
President-Elect, NSGC

ALBERT EINSTEIN COLLEGE OF MEDICINE
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DEPARTMENT OF GYNECOLOGY & OBSTETRICS

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April 22, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

The proposition contained in S158, in my view, is not a scientific or medical question. There is no old or new evidence (scientific or medical) to support the contention that a 2 cell human conceptus is a human person, endowed with rights which the Congress or the Constitution can recognize by meaningful legislation.

Fused germ cells (ova and sperm) are observed in all mammalian reproduction. There are no distinguishing characteristics which can be equated with personhood. The question of personhood with respect to human reproduction technically might be related to the ability of medical science to achieve viability when premature labor intervenes in a normal pregnancy. However, at the time of conception and in the early gestational weeks, attributing human qualities to the products of conception is an impossible task. I believe honest, qualified persons would identify the question as a philosophic or religious one. I hope this information is helpful and that you and your colleagues will not permit emotion to influence your discussions and decisions on this important issue.

Sincerely,

SL Romney

Seymour L. Romney, M.D.
Professor

SLR:vf

Department of Pediatrics
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The Abraham Lincoln School of Medicine *The University of Illinois Hospital*

IRA M. ROSENTHAL, M.D.
DEPARTMENT HEAD

1981 JUN -4 AM 11: 19

May 28, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am replying to your letter of May 13 regarding the hearings on S. 158.

I believe the question of human personhood is primarily a legal question, although it obviously has a scientific basis.

I believe the question of human personhood is in part ethical, philosophical and political. There are obviously moral and religious considerations.

As stated previously, I believe that medical and scientific data combined with legal and political considerations are required for the definition of human personhood in the present context.

I believe that S. 158 would have a major affect on the practice of medicine. It would clearly make it extremely difficult to get an abortion even if there was strong evidence that the child was deformed. There would be no impact on those aspects of genetic screening which occur after children are born. There would be an enormous affect on genetic screening now in process to detect damaged fetuses such as those with Down's syndrome. The result would be a major increase in deformed children being born in the United States who could be detected previously. I also think that some women who might have children, particularly

Senator Max Baucus
Page 2
May 28, 1981

aging mothers, would refuse to have children unless they could be assured of the protection of genetic screening.

I can see no immediate affect on the use of contraceptives. It does seem apparent however that if this bill were to pass, that its proponents would next proceed to steps to ban the use of contraceptives through similar legislation.

Sincerely yours,

Ira M. Rosenthal, M.D.
Professor and Head
Department of Pediatrics

IMR/tb

The Johns Hopkins University School of Medicine / 720 Rutland Avenue / Baltimore, Maryland 21205

Richard S. Ross, M.D.
Vice President for Medicine
Dean of the Medical Faculty
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PM 2:04

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am pleased to respond to your inquiry for an assessment of S.158, a bill "to provide that human life shall be deemed to exist from conception". I oppose this bill not only because of its fallacious rationale but also because it suggests that science can resolve moral problems.

Section I of the bill states that "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception". This statement suggests that the scientifically discoverable facts regarding reproduction are per se an adequate basis upon which to decide what is basically a moral issue. The potential to produce a new human life exists in the gametes (sperm and ova) of the biological parents; the fertilized ovum, zygote, blastocyst and embryo are milestones on the advancing continuum towards production of a new human life. At what stage does "actual human life" exist? This is a question upon which reasonable people will disagree. The Supreme Court in Roe v. Wade made a reasonable decision that the beginning of human life coincides with the time at which there is a significant probability of extrauterine survival.

With regard to the impact of S.158, should it become law, there would be significant undesirable repercussions. Simply stated, any act to terminate a pregnancy after the instant of conception (i.e., the joining of the genetic material from the male and female gametes) could be construed to be homicidal. Physicians who prescribe certain contraceptives such as low dose estrogen oral contraceptives or intrauterine devices would be subject to criminal prosecution. In addition, the rapidly advancing field of prenatal genetic screening would cease to have any purpose, since termination of defective pregnancies would be considered a homicidal act.

The morality of induced abortion is a difficult problem. Medical experts, like the rest of society, have divergent opinions on when "actual human life" begins. This is not surprising in view of the expected controversy over a moral question. Although science benefits society in many ways, it cannot resolve issues whose ultimate solution lies in the thoughtful judgment of informed individuals. Indeed, the question of whether it is moral for any part of society to make such a judgment for the entire society needs to be resolved first.

Thank you for the opportunity to comment on this matter.

Sincerely yours,

Richard S. Ross

Richard S. Ross, M.D.

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1981 MAY 11 AM 10 14

May 6, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In connection with S158, I would like to share with you my opinion that human personhood is not a medical and scientific question, but rather a philosophical one with primarily religious and political implications.

This bill takes advantage of the phrase "human life". The fertilized egg is certainly alive, as is the egg before fertilization, and certainly is human, but it does not represent a person in any conventional sense of the word.

I urge your committee to reject this attempt by an interest group to prevent the exercise of constitutional rights by the majority of American citizens.

I fully endorse the testimony of Dr. Leon Rosenburg on this matter.

Please let me know if I can be of further help.

Sincerely yours,

Peter T. Rowley

Peter T. Rowley, M.D.
Professor of Medicine, Pediatrics,
Genetics and Microbiology
Acting Chairman, Div. of Genetics

PTR:bi

HARVARD MEDICAL SCHOOL

BRIGHAM AND WOMEN'S HOSPITAL

KENNETH J. RYAN, M.D.
Kate Macy Ladd Professor of
Obstetrics and Gynecology
Chairman of the Department

CHAIRMAN, DEPARTMENT OF
OBSTETRICS AND GYNECOLOGY
Brigham and Women's Hospital
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April 22, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Baucus:

In reply to your letter on bill S. 158, I can offer the following:

The proposition advanced by Senate bill S. 158 "to provide that human life shall be deemed to exist from conception" is a philosophical and political notion and not a scientific one.

The property of being "human" can be assigned from the knowledge of the specific genetic endowment of even a single cell when shown to have the .chromosomes characteristic of the human and no other species.

The property of "living" can be assigned when a cell has the metabolic functions that distinguish the living from the dead and from nonliving matter.

The expression a "human being" or "person" has no scientific basis outside of the unique form and characteristics of the total organism that we call a person whether infant, child or adult.

While a single somatic cell (such as a white blood cell) can be said to be human and living no one has thus far claimed personhood for it. The single fertilized egg at conception has the same human, living characteristics of any other cell save for the additional tenuous potential of developing into a recognizable human form some time in the future. (Tenuous because 1/3 of them do not survive) Karl Illmensee's recent cloning experiments in mice demonstrated that even somatic cells retain some of these totipotential properties of germ cells.

It follows that cells and tissues can be human and living and still not be human beings or persons in any reasonable sense. At the one cell stage the fertilized egg is not a "life", a "person" or a "being" in any scientific or secular sense of what these words ordinarily mean. To claim otherwise is to be as arbitrary as Humpty Dumpty when he replied to Alice: "When I use a word it means just what I chose it to mean, neither more nor less."

In embryology, terms such as zygote, morula, blastula and gastrula are commonly employed to describe morphologically distinct stages of development. Personhood is not in that scientific lexicon. There is, however, a relevant scientific difference between the developing embryo and those we ordinarily call persons. The embryo is not a free living organism but changes into one only after it is given "life" in the body of the persons we call women. It is a political and not a scientific decision whether that sustenance is given freely or legislated from women against their will. To the extent that the Congress advances the rights and personhood of fertilized eggs, it diminishes the rights and personhood of the women who are forced to bear them.

Thank you for asking me to comment on this issue.

Best wishes.

Sincerely,

KJR

Kenneth J. Ryan, M.D.

KJR/sfc

THE MEDICAL COLLEGE OF PENNSYLVANIA AND HOSPITAL
3300 HENRY AVENUE · PHILADELPHIA, PA. 19129 · 215-842-7180

DEPARTMENT OF OBSTETRICS
AND GYNECOLOGY

June 1, 1981

The Honorable Max Baucus
United States Senate
Washington, D. C.

Dear Senator Baucus:

Thank you for your letter concerning your role on the Subcommittee on Separation of Powers. It is my strong belief that the questions posed about human personhood cannot be answered on a scientific basis. The intent of S. 158 seems to be to cause confusion and perhaps to overturn the effects of the Supreme Court decision concerning freedom of choice in pregnancy termination.

I will attempt to make specific responses to each of your questions.

1). In my opinion, human personhood cannot be a medical or scientific question. It verges upon the metaphysical.

2). In my view human personhood is based on moral, ethical, philosophical, religious and perhaps, political beliefs, certainly not on scientific data.

3). In my opinion there are no absolute medical or scientific factors available to determine human personhood and thus no scientist can be so presumptuous as to attempt to do so.

4). I believe that if S. 158 was enacted it would be gravely disruptive to the practice of medicine and would cause much grief to women and children in the United States. A full listing of its impact upon the medical practice is not possible in advance but there are many areas where the implications can be anticipated. One example is the possible delegalization of contraceptive methods which prevent implantation of the fertilized ovum. Its most catastrophic consequence concerns tubal ectopic pregnancy. A pregnancy abnormally implanted in the fallopian tube if left will expand and ultimately cause tubal erosion, rupture and massive hemorrhage. At present even the Catholic church accepts the need for the surgical removal of such pregnancy. Biologically a tubal pregnancy is no different from one within the uterus at the same stage of developement.

The act, as written, would prevent a tubal ectopic pregnancy from being operated upon. Maternal deaths due to intra-abdominal hemorrhage would certainly result. I cannot believe that rational beings in a compassionate society can allow such distortion of reason.

This is just one example of the consequence of the passage of S. 158 as written. It seems incredible that in this enlightened era individuals of narrow vision wish to foist their opinions upon an uninformed majority. It would be a tragedy if the clock were turned back and the grim statistics of maternal death of a bygone era return.

If I can help in any way please call upon me to do so.

Sincerely,

Jan Schneider

Jan Schneider, M. D.
Professor & Chairman of
Obstetrics and Gynecology

JS/ctc

NORTHWESTERN UNIVERSITY
CHICAGO, ILLINOIS 60611

1981 APR 27 AM 10: 47

JOHN J. SCIARRA, M.D., Ph.D.
Thomas J. Watkins Professor and Chairman
Department of Obstetrics and Gynecology

PRENTICE WOMEN'S HOSPITAL
AND MATERNITY CENTER
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(312) 649-7504

April 21, 1981

Mr. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Mr. Baucus:

In reply to your request of April 14, 1981 regarding the Subcommittee hearings on S. 158, I am forwarding to you a statement endorsed by the Department of Obstetrics and Gynecology at Northwestern University Medical School and the Prentice Women's Hospital and Maternity Center of Northwestern Memorial Hospital. This statement addresses the issues raised in your letter.

As physicians and as medical educators, we are opposed to any legislation that interferes with the patient-doctor relationship. Senate bill S. 158 attempts to define human life in an arbitrary fashion even though the overwhelming weight of medical and scientific evidence indicates that this is impossible.

As a concerned citizen and physician, I urge your intelligent opposition to this legislation and similar legislation. It is not in the best interests of the men and women of the United States, the majority of whom deem reproduction to be a personal matter.

I hope the above information is helpful to you in your deliberations.

Very sincerely,

John J. Sciarra, M.D., Ph.D.

JJS:ap
Encl.

STATEMENT OF MEMBERS OF THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY OF NORTHWESTERN UNIVERSITY MEDICAL SCHOOL AND PRENTICE WOMEN'S HOSPITAL AND MATERNITY CENTER WITH REGARD TO HB900/SB158:

It is the opinion of the undersigned that:

1) There is no medical and/or scientific evidence to document when life begins. Moreover, at the present time there is no agreement on a definition of life which distinguishes between the capacity of specific cells and tissue to survive independently or in special environments and the generally accepted quality of "life" ascribed to living human beings.

2) The question of when "life" begins must remain in the area of philosophical discourse because of the absence of accurate medical or scientific documentation.

3) Any legislation which would lead to an arbitrary definition of life beginning at conception would result in a total re-evaluation of presently accepted medical patient-doctor relationships. Such legislation represents an unwarranted interference by the State into the private decisions which heretofore had been arrived at by the patient and her physician; i.e., the need for an abortion.

4) The removal of certain types of oral contraceptives and all IUDs by legislative fiat as a result of passage of HB900/SB158 would pose grave threats to the health of numerous American women by denying them the ability to control their reproductive capacity.

5) The enactment of this legislation would place the physician in jeopardy of facing criminal charges of manslaughter or murder as a result of his routine practice relating to certain obstetric complications such as ectopic pregnancy and molar pregnancy (hydatidiform mole).

A summary of this statement was submitted to the Subcommittee on Separation of Powers of the Committee of the Judiciary of the United States Senate in hopes of obtaining a hearing before the Committee. The request for the hearing was denied.

CHILDREN'S HOSPITAL MEDICAL CENTER

Physician Executive Director
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Cincinnati, Ohio 45229
(513) 559-4411

William K. Schubert, M.D.

June 1, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for asking my opinion as a "medical expert". I am pleased to evaluate Senate Bill 158 as a pediatrician, pediatric educator and one whose primary research has not been in the field of genetics. I would like to state before answering any questions that I am not satisfied with the present policy of abortion on demand as it exists in the United States as an alternate to other means of birth control. My answers to your specific questions are as follows:

1. I do not believe that the question of human personhood is a medical and scientific question. I believe that medicine and science can state that with fertilization the division of cells begins which will eventually produce a child. Although these cells have the potential for production of such a child, I do not think that a small mass of cells embodies a human personality or "human personhood".

2. I do believe that the question of human personhood is in part a moral, ethical, philosophical, religious and political question. It is obvious that in many religions personhood begins at conception. In others, personhood does not begin until after birth. The philosophical aspects of this question I am not capable of debating. I do believe that it is unfortunate that the question has been made a political one rather than one of personal, moral and ethical conviction of both the parents and the physician.

3. Since I belive that human personhood is in large part defined by the above considerations, I don't believe that medical and scientific data alone can determine what the definition of human personhood should be. It is obvious that more fully developed fetuses in the order of 500 grams would have normal electroencephalograms, normal electrocardiograms and full developed organs. On the other hand, the definition of when personhood begins, must rest on more than these electrophysiological characteristics.

4. In my judgment, the impact of Senate Bill 158 would impact on the practice of medicine significantly in a negative way. It would eliminate amniocentesis and genetic screening for incorrectable abnormalities which produce death as well as, but more seriously, pain suffering and severe mental retardation for the child and pain and suffering for the parent. Tay-Sachs disease is one of the best examples of this that one can quote. Carried to its ultimate, it would impact on the use of intrauterine devices as contraceptives and on the use of morning after contraceptive pills. It obviously does not eliminate contraception which in my own opinion is not being adequately practiced. The use of mechanical devices such as condoms, diaphrams, are more than adequate substitutes for the intrauterine device. The law would seriously affect the physician caring for genetic disorders to practice medicine with greatest benefit for the mother. It could well result in illegal genetic screening and abortion.

As you say, these are complex and difficult questions. My answers may seem simple; they do represent my opinion on this Bill. I am happy to provide them for you.

pectfully yours,

William Schubert MD

William K. Schubert, M.D.
Professor and Chairman
Department of Pediatrics

Physician Executive Director
Children's Hospital Medical Center

WKS/lj

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1981 JUN -1 AM 10:36

IRVING SCHULMAN, M.D.
Morron and Mary Elizabeth Kendrick Professor of Pediatrics,
and Chairman, Department of Pediatrics
Stanford University School of Medicine

May 28, 1981

Senator Max Baucus
United States Senate
Washington, D. C. 20510

Re: S.158

Dear Senator Baucus:

Thank you very much for inviting my comments on S.158.

I have been a physician for thirty-six years and, therefore, have lived through the period when women were forced to obtain illegal abortions under the worst circumstances possible. I have seen the physical and emotional effects of such trauma on young women, have witnessed the life-long effects of unwanted pregnancies on both the children and their families and have cared for children condemned to a life of pain and misery because of incurable diseases and defects which may now be identified early in pregnancy and prevented from occurring. I therefore urge you, most respectfully, to do everything in your power to prevent the passage of S.158. In answer to the specific questions in your letter I can provide the following comments:

1. I do not believe that the question of human personhood is, or can ever be, a medical and scientific question. "Life", in Webster's dictionary is defined as "an organismic state characterized by capacity for metabolism, growth, reaction to stimuli and reproduction". With this definition, any cell in the human body, including the unfertilized ovum, can certainly be considered to be alive. The same definition would be applicable to any sub-human organism considered to be animate. The concept of "human personhood" goes far beyond the definition of life itself. It involves, in my judgment, the capacity to store information, to learn, to emote, to respond to others, and to sense and to give love. The idea that such characteristics begin to exist at conception is one that I simply cannot consider credible. Furthermore, I do not believe that physicians and scientists will ever be able to make such a determination.

2. I do hold the view that the question of human personhood is a moral, ethical, philosophical and religious one but I simply do not hold the view that it is a political one. Certainly, among the basic characteristics of human personhood are the abilities to think, plan, and decide as individuals. Among the other notable characteristics of humans in contrast to other animal species, is the concept of family and I believe that this vital structural component of our society can only be sustained if parents are granted the right to use their facility for decision making and planning to determine how best to create and nurture their families.

3. I do not believe that medical and scientific data can now, or will ever be able to, determine the definition of "human personhood".

4. S.158, if enacted, will have an enormous, and adverse influence on the practice of medicine. As physicians, we are obligated to provide our patients with all of the information available to us so that they can make the final judgment about

contd...

their own health and welfare. S.158 would place us in a position where we might be prohibited from obtaining information of vital importance to parents in planning their families. Even if such information could be obtained before pregnancy, the only way that parents could use information suggesting the possibility of a genetic disease or malformations in offspring would be to decide not to have any children at all, a very extreme decision since very few genetically determined disorders will affect all offspring. Thus, because of a statistical possibility of having some children with genetically determined disorders, the parents may be forced to decide to have no children at all. Genetic screening for the possibility of inherited diseases would become virtually meaningless under these circumstances since the purpose of such screening is to provide the parents with sufficient information to permit them to make informed judgments. I would suspect that if S.158 were enacted, many forms of contraceptions now in use by parents attempting to plan their families so that they can provide the best for them, would be considered illegal. The impact on population control in our country at large and in individual families in particular would be very severe.

The concept of "human personhood", in my view, must take into account the concept of quality of life in addition to life itself. To condemn certain infants to a life characterized by pain, deforminty, rejection and the absence of those elements of human existence that make life worth living is, in my view, immoral. Many of the world's most respected religious leaders have already enunciated this view.

Thank you once again for soliciting my opinions.

With all good wishes.

Sincerely,

Irving Schulman, M. D.

Yale University *New Haven, Connecticut 06510*

1981 MAY 13 AM 10 43

SCHOOL OF MEDICINE
333 Cedar Street

Department of Human Genetics

May 8, 1981

Senator Max Baucus
Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Baucus:

I wish to register my concern as a medical scientist, with the contention of the proposed legislation, S. 158, that it is scientifically proven that "actual human life begins at conception". This is a view which has never, to my knowledge, been put to a scientific test. Whether a single cell represents an "actual human life" or is just part of the continuum of living things seems more a metaphysical question than a scientific one at this time.

I do not believe that modern science can support the notion this bill seeks to put into law.

Sincerely yours,

Margretta R. Seashore, MD

Margretta R. Seashore, M.D.
Assistant Professor of Human Genetics
and Pediatrics
Director, Genetic Consultation Services

MRS/lh

UNIVERSITY OF WISCONSIN
SCHOOL OF MEDICINE

Department of Pediatrics
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600 Highland Avenue
Madison, Wisconsin 53792

June 1, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to write to you and to respond to the questions in your letter. I, and almost all of my professional colleagues, believe that the definition of human personhood is clearly not a question that can be solved by physicians or scientists. Rather, I believe that it is an ethical, philosophical or religious question--a question that each individual must resolve for him or herself. I do not believe that it is a political question. Indeed, I feel it is very dangerous for a political body such as the Congress of the United States to make, in a pluralistic society such as ours, these kinds of moral and religious decisions.

It is clear, I hope, that I do not believe that medical or scientific data alone can define human personhood.

Were S. 158 enacted it would have a major and surely dilatorious effect on the welfare of children. It would prohibit amniocentesis and genetic screening. It would enormously complicate the lives of families who have already had a defective child and it would undoubtedly result in the birth of many more hopelessly defective children.

Genetic screening and the intrauterine diagnosis of many herediatry diseases is in its infancy. The day when intrauterine therapy of many of these diseases can be accomplished is at hand. S. 158 would clearly end all research in this area and postpone, in this country at least, the day when many of these children can be successfully treated before birth.

Since, as I read the bill, S. 158 would prohibit the use of many contraceptive devices, and since I am sure many women would continue to use these devices, it would automatically make criminals out of a significant portion of the female population.

For these and other reasons I sincerely hope that the Senate of the United States will, in its wisdom, not enact the proposed legislation.

Sincerely yours,

William E. Segar

William E. Segar, M.D.
Dr. Alfred Dorrance Daniels Professor
on Diseases of Children
Department of Pediatrics

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DEPARTMENT OF PEDIATRICS

Box 651

23 June 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing to you in your capacity as the Ranking Minority Member of the United States Judiciary Committee, Subcommittee on Separation of Powers. I am aware that the Subcommittee is conducting hearings on S.158, legislation which seeks to define human personhood as beginning at conception.

I am a practitioner of the pediatric subspeciality of neonatology, an area which deals with the saving of life of infants born prematurely or sick. Infants born as much as 15 weeks prematurely currently have some chance of survival, although this chance is best when prematurity is ten weeks or less.

Prior to 25 weeks gestation, (15 weeks premature), infants have no chance of survival even with the availability of the most modern technology. I have frequently seen infants born very prematurely, between 18 and 24 weeks gestation, for whom I could offer nothing that might enable them to live. It has been my experience that while such fetuses are indisputably alive in terms of their vital functions, most medical professionals and families of such infants do not attribute personhood to them. They are not provided with names, families do not choose to see or touch them, and their burial does not involve the rituals of our society reserved for persons. These practices seem to me to reflect the attitude that such fetuses are not yet endowed with personhood.

There are some who may feel that such fetuses as I have described should be treated as infants. I respect those feelings. The presence of this minority only serves to emphasize that judgements about personhood cannot be made on a scientific basis, but only by each individual on the basis of personal, ethical or religious convictions.

Because of the experiences I have described, and my own personal belief based on them, I am writing to urge that Bill S.158 not be supported.

Sincerely yours,

Donald L. Shapiro

Donald L. Shapiro, M.D.
Associate Professor of Pediatrics
Director of the Neonatology Division

DLS/ms

THE UNIVERSITY OF TEXAS
HEALTH SCIENCE CENTER AT HOUSTON
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MEDICAL GENETICS CENTER

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April 29, 1981

Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of April 16. In addition to answering the questions you posed, I have added two more questions and answers. I am also enclosing a letter to the editor which has been submitted to THE NEW YORK TIMES and THE WASHINGTON POST. Would it be appropriate to publish the letter in the Congressional Record? I have no idea whether it will be accepted by the newspapers.

My responses to your questions and mine are as follows:

1. Do you believe that the question of human personhood is a medical and scientific question? — Yes, in part.
2. Is it your view that the question of human personhood is in part a moral, ethical philosophical, religious, political or legal question? — Yes (in part).
3. Would you agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context? — Yes.
4. Would you agree that moral, ethical, philosophical, religious, political, or legal concepts alone cannot determine what the definition of human personhood should be in the present context? — Yes.
5. Do you believe that the legislative arena is an appropriate forum for the resolution of the question of human personhood? — No.

I agree with the holding in Roe v. Wade that the determination of the "beginning of life" cannot be resolved by fiat by any group (scientific, religious, legal, etc.) and should not be attempted. I believe that we must accept uncertainty on this issue and attempt to live harmoniously without pondering this imponderable question.

The right-to-life vs. pro-choice issue on abortion cannot be resolved by the political process. With the rapid advances in scientific technology (prenatal diagnosis, sex selection, cloning, in vitro fertilization, genetic engineering by recombinant DNA techniques, etc.), the issue will remain alive for decades to come. Society has been propelled into a new technological era which poses new choices never before available. Many members of our society are reluctant to enter the Era of the New Biology. But it is inevitably here and tensions will continue.

On the narrow abortion issue I am whole-heartedly "pro-choice."

Thank you for the opportunity to share my opinions with you. If I can be of any further help, please do not hesitate to call.

Sincerely yours,

Margery W Shaw

Margery W. Shaw, M.D., J.D.
Director

4/28/81

Identical bills have been introduced in each house of Congress (S 158 and HR 900) which state that "...present day scientific evidence indicates a significant likelihood that actual human life exists from conception." It is further stated that the word "...'person' shall include all human life as defined herein." The assertion concerning scientific evidence is without merit. Indeed, present-day scientific evidence indicates there is no likelihood that what we consider to be human life could exist from conception.

For millenia physicians have accepted that human life is at the least associated with certain measurable physiologic functions. Primary among these is a functioning heart-lung system capable of sustained and independent circulation of oxygen-carrying blood throughout the body. In the absence of such a system, human life as generally accepted, does not exist. We know that the earliest rudiments of the cardiovascular system are not identifiable until at least four weeks following conception. It is not until long after that time that a fully functional heart and blood vessel system is capable of sending blood to all parts of the body.

However, blood circulation alone is insufficient to support life. The blood must carry sufficient oxygen to supply the body's various tissues. Providing the blood with this needed oxygen is the job of the lungs. In order to do this, the lungs must have reached a certain stage of development at which the air sacs (called alveoli) are formed. This does not occur until between the 20th and the 24th weeks following conception. That is, the requisite ability to oxygenate and circulate blood throughout the body simply does not exist until midpregnancy or later. It follows then that the conclusion expressed in this proposed legislation has no scientific basis. In fact, all scientific evidence supports the contrary conclusion. (See Nelson, Textbook of Pediatrics, 19th ed., 1975, pp. 17-18.)

Let us compare "the beginning of life" with "the end of life." Death has traditionally been defined as the cessation of heart, circulatory and lung function. Individual cells can still be "alive" after death occurs but no "human being" or "person" exists. Similarly, individual cells of the dividing zygote (fertilized egg) and embryo are "alive" but there is no human being or person in existence.

Many statutes have defined death as the cessation of total brain function even if the heart and lungs can still be kept "alive" by artificial means. In fact, this definition has been accepted by the medical profession. This analogy would lead to a definition of human life in utero as that time when the brain has developed to the point that it can sustain the rest of the fetus without the mother's life-support system. This probably does not occur until after the 18th week of pregnancy.

Without question, the potential for human life exists from the moment of conception. That is, certain conditions need be satisfied before human life will come into being. However, the same, or at least a very similar potential can be said to exist in the gametes (unfertilized eggs and sperm). Only one more condition need be satisfied, namely conception, before the process that culminates in human life can continue. That being the case, then, Congress logically could set the point at which "human life" was deemed to exist as the moment of production of the first human sperm or egg. This position is no more absurd than defining the moment of conception as the beginning of human life. After all, the ovaries and testes of the present generation contain all of the genetic material for all future generations. The zygotes (fertilized eggs) of the present generation contain all of the genetic material for the gametes of the next generation. If zygotes are afforded legal protection, it is only one small step to protect the gametes by declaring "human life" to exist in eggs and sperm and to prohibit all sterilization and contraception.

Zygotes and gametes should be protectable from environmental assaults such as radiation and chemical mutagens but they should not be given the legal status of personhood with due process and equal protection. Zygotes and gametes are not "persons" by any stretch of the imagination. The major problem with the Bill is equating a living cell (e.g., zygote) with a human life (mature fetus) or a person (e.g., live-born human being). By no semantic gymnastics can this argument be sustained. The confusion in terms stems from the illogical attempt to harmonize scientific evidence with philosophical beliefs and legal concepts.

There are many unavoidable implications should this legislation proceed. First, it would accord "human life" status to tubal pregnancies and tumors such as hydatidiform moles, choriocarcinomas, and teratomas -- all of which may threaten the woman's life. These all are indeed products of conception and arise from fertilized eggs but have no potential to become human beings. Even the placenta (afterbirth) is a product of conception and differentiation of the zygote. Next, all research in the area of in vitro fertilization and embryo implantation would immediately cease. This would paradoxically prevent thousands of couples the opportunity to bear children at a time when this major breakthrough in treating women is about to become available on a widespread basis. Conversely, the Bill would not prevent artificial insemination, which is frequently used to overcome male infertility. Men and women alike should see this as another example of sex discrimination.

This Bill appears to be an attempt to turn back the clock several hundred years. Centuries ago it was thought that conception resulted immediately in a microscopically small, but fully formed and functional human being. It was even thought that there was a "homonculus" (or "little man") present in every sperm and that the egg only carried and fed the human being until birth. Since the invention of the microscope we know that this simply is not true. Now there may be many reasons for wanting to turn the clock back. Some may even be good. However, if, as would be the case here, it is no more than an attempt to overcome an unpleasant reality by invoking a fantasy, our desire to return to simpler times should be resisted. The consequences of indulging our fantasies may be far worse than the reality we are escaping from.

Wesley Sokolosky, M.D., J.D.
Margery W. Shaw, M.D., J.D.

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98105

School of Medicine
Department of Pediatrics

April 24, 1981

Senator Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I am answering your letter on S.158. In my opinion conception does not mark the beginning of a legal person. I could not support S.158 for a number of reasons which would apparently be of little interest to you.

My answers to all three questions you asked in your letter of April 16th are "yes." Personhood is a very complex problem and any definition will need the input of ethical, philosophical, political and scientific experts. Clearly such a definition, if reached, would need to be reassessed at a future date. We are living in a changing world as you know. One of the most carefully worded definitions I have seen was by a committee chaired by Dr. Richard Behrman, Dean of Case Western Reserve Medical School. This definition appeared in the Federal Register, November 16, 1973, Page 31740, Paragraph G. The thrust of this definition was that the decision should be made by the attending doctor. You probably have read the pertinent chapters in the book edited by Milunsky and Annas, Genetics and The Law, Plenum Press, 1976.

Here in the State of Washington we teach our medical students that fetuses of less than twenty weeks or 500 grams body weight do not require burial permits and other legal papers. Most obstetricians will not make strong efforts to resuscitate fetuses less than 500 grams.

Although I do not approve of therapeutic abortions, I regard the existing alternatives to be far worse.

Sincerely yours,

Thomas Shepard

Thomas H. Shepard, M.D.
Professor of Pediatrics
University of Washington
School of Medicine RD-20

cc: Senator Slade Gorton
Senator Henry Jackson
Congressman Joel Pritchard

THS:mk

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1847

June 8, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I wish to thank you for allowing me to give you some input into a subject that I think is exceedingly important at this present time. I think the present Bill S. 158 is very divisive and comes very close to being exceedingly dangerous.

I am certainly not an expert in this area and I think the Senate and particularly the Subcommittee on Separation of Powers should seek out such experts as Leon Rosenberg and others who have given this particular problem and subject indepth consideration over the years.

It is obvious that scientists, physicians, philosophers and theologians have debated this issue of the definition of human personhood.

This argument has gone on for many decades and as far as I can tell, there really has been no concensus on this issue and I think that is even more true in modern times. I think if you were to do some type of organized objective survey you would find that scientists in general and certainly America's pediatricians in particular would be very divided in answering these difficult questions related to the definition of human personhood.

I imagine that the Subcommittee has had the opportunity to review the outstanding testimony of Leon Rosenberg of Yale University. I know Doctor Rosenberg personally and I know him to be a very thoughtful person who has been involved with the ethical, philosophical, religious and political aspects of this issue for many years.

I am also very certain that his views would be supported by a vast majority of physicians who are involved with mothers and their children or potential children.

From my own personal viewpoint, I do not feel that medical and scientific data alone can determine what the definition of human personhood should be in the present context. I think it is a much more complicated issue than this. I do feel however that medical and scientific data certainly has to be utilized along with moral, ethical, philosophical, religious and other factors in developing a rational approach to this problem.

In my judgment, the passage of S. 158 would be a disaster. There are now many very excellent genetic screening programs presently underway in this country and some are designed to pick up serious and sometimes correctable problems early in infancy, however, another important part of screening has to be with prenatal screening and intrauterine diagnosis.

Obviously the emphasis on genetic screening has been towards the prevention of birth defects, however, there will always be situations where parents are confronted with a pregnancy which will result in a severely retarded or deformed infant and they will have no choice at all in regards to deciding what should or should not be done.

In addition, there are many other examples where this law will create tremendous injustices and problems. Certainly in the case of incest, rape, etc., this will give the woman no choice at all.

In summary then, I sincerely hope that the Subcommittee has taken the opportunity to review the testimony of experts in this field and furthermore, I would hope that the ultimate decision will be not to pass this Bill.

Sincerely,

Fred Smith

Fred G. Smith, Jr., M.D.
Professor and Head

FGS:jvr

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June 10, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus

This is in response to your letter of May 13 inquiring about Proposed Bill S158. I believe that there are at least three questions in this area including:

1. When does life begin?
2. What are the human rights throughout the life time period
3. What should Society do to insure these rights?

I believe that I am only competent to give an opinion on number one and to speculate on number two. You have the difficult responsibility for number three.

In the classic biologic definition life exists when there is the use of substrate like food and oxygen, and when there is the potential for cell duplication. Both of these are present after conception. One could argue that the potential for continued cell division only exists after implantation of the conceptus into the mother's uterus on day 7 after fertilization. Thus, life could be scientifically defined as beginning at either of these two timed points (conception-implantation)

The second area concerns the rights of the living person. There would appear to be different rights at day 7 (a few hundred cells) compared to day 278 (7 pounds of fetal weight), compared to age 15 and 21 years. There is much more potential for survival after midpregnancy (20 weeks-500 grams) than before that time for live born abortions do not survive whereas premature infants do.

The determination of these rights and their protection is obviously difficult and very philosophical. For example, can one be insured against health and death risks at 10 days of gestation. Therefore I believe one can say all humans attain "life" at the same definable time (conception or implantation) but rights are sequentially obtained and the rights of a two week fetus are not equal to those of a term fetus or adult. I believe that the enactment of Bill S158 would be extremely disruptive for Society to exist with. It could affect the use of some current contraceptives like the intrauterine device, it could limit the early pregnancy genetic studies to find severely malformed nonviable fetuses and others in need of therapy, and it would obviously have a closure effect on therapeutic and elective abortions.

The American College of Obstetricians and Gynecologists have also addressed these questions and I am enclosing some of their collective thoughts in case you haven't already seen them. If I can be of any further help, please let me know.

Sincerely,

W. Spellacy

W.N. Spellacy, M.D.
Professor and Head

WNS:ml
enclosure

DEPARTMENT OF OBSTETRICS AND GYNECOLOGY

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1981 JUN 10 PM 12:07

UNIVERSITY OF OREGON

HEALTH SCIENCES CENTER

June 2, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for the opportunity to comment on Senate Bill 158. If this bill is enacted there are three major areas of impact which concern me, my colleagues and my Department (and they are not listed in order of importance): (1) the impact on our ability to teach reproductive medicine, (2) the financial impact on the State, our Institution and my faculty members, and, (3) the general impact on the health of women.

1. The Impact on our Ability to Teach Reproductive Medicine

   It would become illegal to perform, encourage, or promote abortions. The performance of an abortion is an essential skill for the modern obstetrician/gynecologist. Since the various bills being proposed to regulate abortions continue to allow abortions to save the life of the mother, and it is inevitable that there will be cases when abortion would be necessary under those circumstances, the obstetrician/gynecologist must be able to perform this abortion with appropriate skill. One does not learn to do abortions by doing only a few. It takes many to acquire the skill which limits complications. This bill would prevent our obstetrician/gynecologists from gaining such skill.

2. The Financial Impact -

   If abortions became illegal, it would cost the government many millions of dollars to provide for the care of the pregnancies and for assistance of the family. I know that the legislature is aware of this financial dilemma, but I would like to share with you the crisis which is upon us in obstetrics in the State of Oregon.

   Approximately one and one-half years ago there was a sudden increase in the number of deliveries at our University Hospital. This increase has persisted. An analysis of this change has revealed that this increase is largely due to an increasing medically indigent population turning to the University Hospital because they cannot pay their obstetrical bills. Because this increasing obstetrical volume had an impact on the quality of our educational program, I turned to the community for help in sharing this problem. I pointed out that approximately 66% of our patients were responsible for their own bills (only 19% received welfare support) and that 43% of those patients could not afford to pay a single cent. Community response has been revealing. This is not just a problem at University Hospital, it is widespread across the State.

More and more middle class families cannot pay significant medical bills, and physicians throughout the State are coping with an increasing number of nonpaying patients.

The problem is especially acute for our Institution and for my faculty. In the coming two years our Hospital is expected to earn 82% of our budget from patient fee. Of my Department's budget, 36% is derived from patient fees. I hope you can see our dilemma: we are dealing in obstetrics with more and more patients who cannot pay their bills, yet our budgets are more and more dependent upon money derived from patient care. If this cycle continues, it means loss of [illegible], non-medical personnel and faculty members.

The impact of this bill would intensify the financial crisis for obstetrics in Oregon especially for our Institution and my Department.

3. The Impact on Women -

I find it personally distasteful to argue the pros and cons of this bill in terms of money. The financial considerations pale to insignificance when compared to the issues of health and well being of women and families.

Making abortions illegal does not do away with the reasons for which women seek abortion. There will still be the poor woman who cannot afford another child, there will still be the unmarried woman who does not want another child, there will still be women with health problems short of the risk of death.

I have never thought of myself as an old man, but when it is possible to talk from the point of historical perspective I guess I'm older than I think. During my training, the gynecologists in most hospitals were the experts in the management of shock due to severe infection. The reason was the great number of women who came to our hospitals because of infected and illegal abortions. The legalization of abortions had less of an impact on the number of abortions than on the safety. Today abortion is essentially our safest operation. In my day every week we saw several women in our hospital on the verge of death due to infected abortions and every year we lost many. I don't want gynecologists to become experts again in septic shock. If abortion is made illegal or unavailable for poor women, those women will once again seek abortions from unsafe sources.

In my opinion, the decision to have an abortion is a personal one. I do not believe that the question of human personhood can be scientifically decided. It is partly moral, ethical and philosophical. The impact of this bill on our practice of medicine, including genetic screening and the use of contraceptives would be enormous and there is no doubt in my mind it would be a negative impact. I am opposed to the intervention of the State in this very personal decision.

Thank you for the opportunity to present my point of view.

Sincerely yours,

Leon Speroff

Leon Speroff, M.D.
Chairman and Professor
Obstetrics and Gynecology

LS:gu

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1981 JUN -1 AM 10 41

May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in answer to your letter of May 13, 1981 seeking my opinion as a medical expert with regard to the legislation Bill S.158. In answer to your first question, I do not believe that the question of human personhood is a medical and scientific question. The quality of being "human" cannot be defined in scientific terms and must be looked upon from a humanistic point of view. This answers your second question that it is in my view in part a moral, ethical, philosophical, and religious question. It obviously has political implications or it would not be involving the United States Senate in this context. However, I do not believe that it can be defined in political terms either.

My answer to question number three is, therefore, that I do not believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context. In answer to question four, I would like to take up a series of problems as I see them which would be related to the passage of this Bill. First, this regards contraception. I believe that contraception, both with the pill and with I.U.D.s which, as I understand it, this Bill would make illegal, is firmly entrenched as a part of the life-style of, not only American women, but of their sexual partners. To force women, and especially those with husbands, back into the mold of the fear of pregnancy would not only be unacceptable, but, I believe, completely outside the purview of a legislative body, such as, the Senate. Additionally, I do not believe that one can legislate morals. The failure of such legislation is well known. One has only to remember the disastrous effects of the prohibition of alcohol on organized crime in this country to recognize its futility. I, therefore, believe that contraception is here to stay and that women and their sexual partners will demand it and obtain it regardless of any legislation.

In a more narrow context, I believe that this Bill would destroy the useful programs of genetic screening which might have indication for the termination of pregnancy in those cases where severe maldevelopment would have resulted. To my way of thinking, this type of genetic screening and the termination of those pregnancies with unremediable deformities whether they be physical, neurological or metabolic has been one of the most important advances in our management of high-risk pregnancies in recent times. The abolition of abortion for incest, rape or those which are done to either save the mother's life or even prolong her life when she has chronic illness or where one can demonstrate that the pregnancy would impair the mother's health, whether it be mental or physical, I believe is a very unfair burden to place upon a women who is a known "person" but whose fetus or embryo is an unknown or only potential "person". There will undoubtedly be, as there was before abortion became legal, many unwanted pregnancies which will end in illegal abortions which will risk the mother's health, and many times her life. There will also be many unadoptable children, children who are abused, neglected and unwanted. This is especially true of those children who are not normal. Those of us who looked after children before abortion became legal remember how many minority, such as blacks,were unadoptable and how many children with gross deformities were not only unadoptable when abandoned by their mothers, but also frequently abused or neglected. Many of these unwanted pregnancies, if carried to their termination, will terminate in very ill, very costly children with multiple and often unremediable deformities. These will include physical, neurological and metabolic problems which will have to be cared for during their life time. Many of these are extremely painful requiring multiple, surgical and medical hospitalizations and,despite the best of medical care, these children go on to die at an early age predictably. Life for many of these children is truly intolerable. Many times these children are extremely difficult for parents to manage both physically and emotionally and certainly financially and facilities for such children are not adequate nor is emotional or financial support to parents provided for.

I believe that to prohibit indicated abortions without providing for the unwanted offspring of those whose parents cannot care for them medically, financially or emotionally is totally irresponsible legislation.

In summary, although I am not an advocate of all abortions, I believe that some abortions are not only necessary but very desirable. In my ethical decision making, I have always tried to consider myself the advocate of a patient, and in this case, I consider the fetus my patient. I have always considered that the ethical decision should be made first with the consideration for what is best for the patient, secondly, for what is best for his family and thirdly, what is in society's best interest. If all three of these interests happen to coincide, we are indeed fortunate and our ethical decisions then are easily arrived at. It is when these are at odds with each other that the decision-making process becomes difficult.

I appreciate the opportunity to express my opinion on this very important Bill and I will follow its discussion in the Senate with great interest.

Sincerely yours,

Mildred Stahlman, M.D

Mildred T. Stahlman, M.D.
Proffessor of Pediatrics

MTS/dp

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May 27, 1981

The Honorable Senator
Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington DC 20510

Dear Senator Baucus:

Thank you for your letter of May 13, 1981 requesting my evaluation as a Medical Geneticist and Pediatrician of S.158. Medical science has demonstrated unequivocally that at the moment of conception a biological life process begins which has the potential to develop into an animal of the species Homo sapiens. If and when that animal can attain the dignity of a higher order of life embodied in the concept of humanness are metaphysical questions proper only for philosophers and theologians to address as experts. Indeed, on this my only expert advise is that there is nothing in the training or professional experience of medical scientists which could qualify them to offer any expert opinion on the concept of humanness.

The impact of S.158 on the clinical practice of medical genetics would be profound. After genetic counseling, less than 1/4 of couples change their precounseling intents respecting initiating additional pregnancies. Consequently, for many couples desiring biological offspring, prenatal diagnosis with selective abortion of defective fetuses is the only option for having normal children. S.158 would abolish that option forcing these couples either to have no more children or risk major congenital birth defects. Of course the rich could escape the dilemma by traveling to less restrictive countries while the poor could risk the illegal abortionist. Our experience in the U.S. with Prohibition suggests that these evasions very likely might become the rule.

The following date may give you an idea of the magnitude of the problem: In the USA, about 5% of the $\sim$3 million yearly live births are to women over 35 years of age. The risk of having a baby with a chromosomal abnormality (which often results in significant birth defects) in this maternal age group is 1-5%. Also, any couple who have once had a chromosomally abnormal baby have at least a 1% chance of having another chromosomally abnormal baby. Chromosomal abnormalities in the fetus can be detected by prenatal diagnosis via amniocentesis at 15 weeks gestation. In women of all ages, the risk of a baby with a neural tube defect is about 1/500 live births. The two year survival of babies treated for neural tube defects is only 65% and of the survivors about 1/2 have significant neurological deficits and/or mental retardation. Neural tube defects in the fetus in the fetus can be detected by prenatal diagnosis at 15 weeks gestation. Sickle Cell Disease (1/400 black babies) and over 60 other rarer severe hereditary disorders of babies' are now detectable by prenatal diagnosis at 15 weeks gestation. Cystic fibrosis, a severe and incurable disorder, affects ~1/1500 white children. Cystic fibrosis will soon be detectable in the fetus at 15 weeks gestation by prenatal diagnosis via amniocentesis.

Despite the above, you should realize that on the average prenatal diagnoses reveals an unaffected fetus in over 96% of instances. Consequently, in the vast majority of cases, the end result of prenatal diagnosis is a normal baby, not a therapeutic abortion. Moreover, it is a normal baby which, without the reassurance of prenatal diagnosis, may not have been conceived or which may otherwise have been blindly aborted by parents afraid of a high genetic risk for a defective child. All in all, abortion for genetic defects accounts for less than 1% of all abortions induced per year in the USA.

With hopes that this is of some help to you in your deliberations, I am,

Sincerely,

Mark W. Steele, M.D.
Associate Professor of Pediatrics
Director, Division of Medical Genetics

MWS:dw

General Reference:

Aubrey Milunsky, Genetic Disorders and the Fetus. Plenum Press, New York, 1979.

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Department of Biology

1981 MAY -1 AM 9 36

28 April 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I write concerning S. 158 a bill that, as you know, provides that human life shall be deemed to exist from conception.

While it is true that the fertilized egg is a living cell and has the potential to develop into a human being it is, in my opinion, no more a human being than, for example, a white blood cell. The latter is a living cell, has all the information necessary to form a human being, but requires conditions which we do not yet understand to develop into a human being. What holds true for the white blood cell holds true for virtually all other nucleated cells of the human body. The fertilized egg cell does not differ in this respect from all other cells. It also needs specific conditions to develop, i.e. the uterine environment of a human female.

In many states death is defined as having occurred when the brain waves are flat. Nevertheless, most of the cells and organs of such an individual are alive. I need hardly point out that the heart and kidneys are sometimes taken from such an individual for transplant into another. The mere fact of being a live cell and having the information necessary to form a human being is not sufficient to define a human being.

An unambiguous definition of a human being, entitled to the protection of the 14th amendment to the constitution of the United States, is an organism that can survive outside its mother's uterus.

I regret that this letter is sent to you after the hearings have been held, but I did not become aware of them until too late to write in time for the hearings.

Sincerely yours,

Arthur G Steinberg

Arthur G. Steinberg
Francis Hobart Herrick
Professor of Biology
Department of Biology
Professor of Human Genetics
Department of Reproductive Biology
Professor of Medicine
Department of Medicine

AGS/dek

cc: Dr. Neil A. Holtzman
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June 7, 1981

The Honorable Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am in receipt of your letter of May 13th requesting my professional response to Legislation S. 158. I am particularly pleased to have received this letter since my entire professional life I have been involved in clinical service, research and teaching activities in this area of human reproduction. Furthermore I think my background is quite suitable as I am sure will be clear by perusing the enclosed curriculum vitae to consider the questions raised by S. 158. I wish to make the following responses to the questions:

1. I do not believe that a question of human personhood is a medical or scientific question. The same way a question of soul is not a medical or scientific question.

2. I fully agree that human personhood is in part a moral, ethical, philosophical and religious question. As a matter-of-fact I feel strongly that it is primarily a philosophical question.

3. Since human personhood has not been defined on the basis of medical or scientific data such data cannot be used in the present context.

4. The impact of S. 158 on the practice of medicine would be devastating. Numerous essential tests to both prevent and treat some of the most serious genetic disorders would be denied to the general public regardless of their moral, religious or political beliefs.

Probably the most serious problem with S. 158 is the attempt of a legislative body to assume the role of a college of philosophers in determining when life begins. The travesty and almost levity of the entire issue is the attempt of a group of legislators to utilize quasiscientific, quasimoral and quasiethical tools to arrive to a philosophical conclusion. The term life has not been defined by science. For example, an arm, finger or a heart can be kept "alive" under certain experimental conditions. Does this mean that the arm, the finger, the liver, etc. has "life?" An ovum "an egg cell" is alive, thus killing an ovum constitutes murder or thus a crime. Every female "murders" thousands of ova regularly although not willingly. One probably could find scientific ways to prevent this "murder" thus by not preventing this murder we are all guilty. A sperm cell is "alive." With each ejaculation a male delivers numerous sperm cells in an environment which is hostile, e.g. the vaginal environment. In the vaginal environment the sperm cells are "killed" by the female secretions, consequently the female is killing the sperm cell. Since the sperm cells are "alive" is the female guilty of murder?

It is my deep belief that at this time one cannot either define "life" thus the stage of organism's development related to "life" or define the stage of fetal development in which "life" begins, since prior to fertilization both the sperm cell and the ovum are "alive."

One can go on with a variety of arguments which really are pointless and plastic in nature totally with no benefit to the debate. I fully respect the view of individuals who feel that life begins at the "moment of conception" except that the term "conception" according to Webster's dictionary means "the act of becoming pregnant." Since the act of becoming pregnant is intercourse the life must begin at the moment of intercourse. This is patently ridiculous. It is ridiculous since the act of conception involves the act of intercourse and since the act of intercourse is usually preceeded with some activity not related directly to sexual organs and since this activity is frequently preceeded by some emotional interaction and since this interaction is frequently preceeded by some social interaction one could go at infinitum and state that life begins at the time when a male and female meet and have a cup of coffee together.

Obviously if I can be of any assistance in a more serious vein, looking at scientific facts, I will be more than happy to do so.

Thanking you for this opportunity, I remain

Sincerely yours,

Emil Steinberger, M.D.
Professor and Chairman
Department of Reproductive
Medicine and Biology

ES/aw

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195

Department of Obstetrics and Gynecology, RH-20

June 9, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing this letter in response to your inquiries regarding the hearings being conducted on Senate Bill 158. In my opinion this is a most mischievous bill which seriously confuses philosophical and scientific issues. The concept of human personhood is not a medical or scientific question but rather a philosophical one. The definition of biological life could correctly be ascribed to the sperm or the egg, just as much as it can be to the fertilized zygote. When, then, does human personhood actually begin? Most physicians, myself included, are comfortable with the concept of human personhood occurring when there is even a remote chance that life can be sustained outside the mother's body. This is by experience sometime between the 20th and 25th week of gestation. Many of us have been uncomfortable with the regulations which allow for abortion any time during the first and second trimesters and have within our own hospitals tended to not perform a termination of pregnancy after the 20th week of gestation unless a clear-cut genetic indication could be shown. This, then, is the definition that most physicians find comfortable.

My opening comment that the bill is mischievous must be viewed in the context that were it to be enacted it would absolutely prevent the practice of good medicine. We would be back at a time when the mother's life would be sacrificed in order to save the child. There are many instances in which this would be very sad indeed. In the case of the mother who has cancer of the female organs diagnosed in early pregnancy or in the case of the mother suffering from a life-threatening disease such as heart disease or advanced diabetes it would be impossible to sacrifice the baby in order to save the mother. Genetic screening, in addition, would also be outlawed, meaning that women would be forced to either carry a pregnancy no matter what her risk of having a diseased infant, or to practice absolute contraception and therefore deprive her and her husband of the opportunity of parenthood, simply because the risk of having an imperfect infant would be too great. I have lived through the era where both these circumstances were the case, and do not wish to return to it. I really do not think that even the right to life group has any idea of the problems they would be placing on the human race.

My experience with respect to abortion is that legal or illegal, women of means will obtain it. Women who do not have the means may actually make some attempt at termination, frequently paying the price in infection, hemorrhage, and even death. We have seen an end to this carnage of human women during the liberalization of abortion laws. Human nature being what it is, I believe a change in the law would simply return us to the days when such problems were commonplace.

In summary, I would state emphatically that the problems addressed by this bill are not medical or scientific and indeed would set the medical and scientific community back 20 years. These are primarily moral, ethical and philosophical issues and should be dealt with in that context. It is a travesty to line up scientists on either side arguing when life does or does not begin. In the long run the health of our citizens may well be greatly jeopardized.

I do appreciate your giving me the opportunity to express my opinion, and do hope that the Senate is able to defeat this bill.

Sincerely yours,

Morton A. Stenchever, M.D.
Professor and Chairman

MAS:js

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PEDIATRICIAN-IN-CHIEF

May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

My response to your letter of May 13th regarding the SubCommittee hearings on S. 158 can best be summed up by indicating to you that I am totally supportive of the testimony given by Dr. Leon Rosenberg at the SubCommittee hearings in April. Although I have not seen the total transcript of these remarks, I have based these conclusions on the report in the New York Times as well as on the article which appeared in Science on May 8th (Volume 212, Pages 648-649).

In this view the specific answers to the questions which you have asked me in your letter would indicate that the question of human personhood is not a medical and scientific question at least certainly not in its totality and that the question is in large measure one of moral, ethical, philosophical, religious, or political views and persuasions.

It follows from that that I do not believe that medical and scientific data alone can determine what that definition should be, but I would need to indicate to you that the impact of S. 158 if enacted on medical practice, specifically on such items as genetic screening, counselling, and intrauterine diagnosis would, I believe, be profound. I would not by myself have considered the impact that it may have on the use of contraceptives and other means of birth control, but I am persuaded that it may be equally so in this area as well.

To the extent that such legislation risks both the introduction of legislative fiat as well as the possibility of violations of enacted law into areas that are currently regarded as matters of individual choice and conscience, I would find it difficult to support the objectives of such a bill. I could not by any means be counted as a supporter of free or liberal abortion laws, but I cannot accept that my own beliefs in this area could or should be used as a maxim or basis for legislation in these matters which it is my own view are matters of individual conscience, choice and decision that each of us must make at the appropriate time.

I hope that these views will be helpful to you.

Sincerely yours,

Leo Stern, M.D.
Professor & Chairman of Pediatrics
Brown University

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Pediatrics

May 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I was honored that you asked me in your letter of May 13, 1981, about my opinion about proposed legislation numbered S. 158.

I will briefly answer your questions as you posed them.

1. I do not believe that the question of "human personhood" is a medical or scientific question.

2. It is my view that this question is in part moral, ethical, philosophical, religious, political and most of all, it is a legal question.

3. I do not believe that medical or scientific data have anything to do to define the question of "human personhood".

4. In my opinion, the impact of S. 158 would be a major setback in the development of civilization. It obviously would affect the practice of medicine in a very negative way, genetic screening could not be continued and, of course, our present epidemic of teenage pregnancy could not be handled. There is no question that I, as many responsible physicians, would favor that unwanted pregnancy should be avoided at all costs and the use of contraceptives is preferable. Yet, I firmly believe that every woman should have the right to decide whether a pregnancy is terminated or not. This question of termination of pregnancy as far as legislation is concerned should be clearly one of separation between religion and state, religious convictions should not interfere with political decisions. As a pediatrician, I am not involved in doing abortions. I personally do not like the idea of having it done as a medical procedure. However, if I consider the consequences of unwanted pregnancies following rape, following incest and in difficult socio-economic circumstances, in teenagers, I have no difficulty at all to accept this as a necessary solution for many unhappy women.

I just hope that our United States Senate remains in the 20th century and does not return to medieval mysticism.

Sincerely yours,
G. B.

G. B. Stickler, M. D.
Professor of Pediatrics

GBS:kdm

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June 3, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 30510

Dear Senator Baucus:

I am writing in response to your letter of May 13, 1981, concerning hearings on S. 158. I will try to answer your questions in sequence. You asked whether I believe that the question of human personhood is a medical or scientific question. I do not believe that it is but rather that the answer to this question is the answer to your second question which asks my view relative to the question of human personhood being in part a moral, ethical, philosophical, religious or political question. I think that this question was addressed most eloquently by Dr. Leon Rosenberg, Professor and Chairman of the Department of Human Genetics at Yale University Medical School. I enclose a summary of Dr. Rosenberg's statement which appeared in Science, on May 22, 1981. Dr. Rosenberg emphasizes that he has been able to find not one single piece of scientific evidence that would help him to answer the question as to when does a potential for human life become actual. I think Dr. Rosenberg states the crux of the situation when he says that he has no quarrel with anyone's ideas on the matter, so long as it is clearly understood that they are personal beliefs and not scientific truth.

In answer to your third question, I do not believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context. Again, this is addressed very eloquently in Dr. Rosenberg's testimony.

Dr. Rosenberg also addresses your fourth question regarding the impact of S. 158 if it is enacted. He specifically addressed the impact on the practice of medicine, genetic screening and the use of contraceptives. Relative to contraceptives, the so-called "morning after" pill and the intrauterine device would be eliminated as contraceptive measures. The legislation would also eliminate widely employed programs of prenatal genetic diagnosis which are designed to offer parents options in preventing the birth of defective infants. I think that this legislation would be a travesty on justice and a severe interference with individual rights. When legislation such as this is based on religious views and not on scientific evidence, then I find no defense for it when it imposes the beliefs of some on the lives of all citizens of our nation.

I appreciate your letter, the copy of S. 158, and the opportunity to respond to your questions. After reading the text of S. 158, I must conclude that much of it is virtually incomprehensible.

I would appreciate hearing from you the results of the hearing. If I can help you further, please do not hesitate to contact me.

Yours Sincerely,

Robert L. Summitt

Robert L. Summitt, M.D.
Dean of Medicine
Professor of Pediatrics, Anatomy,
and Child Development

RLS:dm

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June 3, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13, 198., requesting my opinion regarding the legislation S.158.

The question of medical abortion is, obviously, not only a scientific, but philosophical question as well. The answer as to when life actually begins is dependent on the philosophical bent of the person who is to act as a medical expert. In reviewing the legislation S.158., it is obvious that Mr. Helms has found it necessary to legislate into law what, indeed, should be the choice of the mother depending on the circumstances around which an abortion is requested. I do not feel that Federal funding of abortion is necessary, but to legislate into law prohibition of abortion, would cause those requiring abortions to have them done illegally within or outside of the United States causing the same potential disaster that previously existed when women were forced into having illegal abortions. In addition, it would prohibit, for appropriate medical purposes, the aborting of fetuses with various congenital anomalies and malformations. The law, if passed, could have serious social repercussions. Although I personally do not support, philosophically, the idea of abortions, I do feel that it is an individual's right to determine whether in her own situation an abortion is appropriate for medical, psychological or social reasons.

If there is any further way in which I can be of help to you or your Subcommittee, please feel free to contact me. I remain

Sincerely yours,

Robert Suskind

Robert M. Suskind, M.D.
Professor and Chairman

RMS/pac

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Office of the Chairman

June 3, 1981

The Honorable Max Baucus
United States Senate
Washington D.C. 20510

Dear Senator Baucus:

Your letter of May 13 just arrived on my desk today after a long sojourn through the university mail system. I hope this reply arrives in time to be of some use. Even before I received your request for an opinion, I sent a letter on the subject of S. 158 to all members of the House and Senate Judiciary Committee; so you have my views in one form, but not in the order in which you have asked your questions. In brief, therefore, and in the order of your questions, here are my views:

1. I do not believe that personhood can be determined by scientific means. Dr. Leon Rosenberg of Yale spoke to this question on his testimony before your committee, and I endorse his views.
2. I think personhood is a concept that belongs to philosophy, religion, and politics. I have no doubt that each of these fields can provide many definitions of personhood and that most of those definitions will make at least some sense.
3. Medical and scientific evidence can offer no help in choosing between the various definitions of personhood.
4. A lawyer is better qualified to predict the impact of S. 158 than I am. I assume, however, that the bill would outlaw elective abortion for any reason. This, of course, would make it necessary for women to carry a child to term even in cases--such as teenage pregnancy-- where motherhood might have a ruinous effect on the woman's life. Even when prenatal tests show a fetus to be suffering from an incurable and devastating genetic disorder, the woman will have no option; she will be required by law to play out the tragedy.

S. 158 adopts a particular religious position as the official doctrine of the nation. But this is a religious view that is not by any means universally accepted. It restricts decisions that many of us consider to be essential to our well-being (such as the right to control our own fertility), and it prohibits the use of scientific methods that can reduce the burden of suffering caused by genetic diseases. In my opinion, this bill makes life, which is already hard enough, even more hazardous and difficult.

Yours sincerely,

Millard Susman

Millard Susman
Professor and Chairman

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Department of Obstetrics and Gynecology

May 13, 1981

Mr. Max Baucus, Senator
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I regret that your letter of April 14, 1981 concerning hearings on S.158, failed to reach me promptly. I am currently on sabbatical from the Albany Medical College and some of my mail is accordingly delayed in reaching me. However, I understand that the hearings on S.158 will continue.

I welcome the opportunity to express my views on the questions which S.158 raises for our Nation.

Firstly, despite the contentions of those who disagree with the Roe v. Wade Supreme Court decision, I am of the opinion that the Supreme Court addressed this question comprehensively in relation to the competing interests of the State, and the person of the woman who has conceived. It is my opinion that the Supreme Court recognized for the woman her right to determine the events which should take place within her own body, the risks to which she wished to subject herself in the interests of either the continuation or termination of a pregnancy, and the very longterm and onerous responsibilities for the future care of her offspring. Quite separate and distinct from all of those aspects in those instances in which a reasonably normal infant offspring is anticipated the Supreme Court's decision also left to the patient's discretion decisions with respect to her willingness to bear offspring that modern scientific prenatal diagnosis may quite accurately identify as being impaired in various ways, both physically and mentally. The Supreme Court appropriately established the right of the woman to make judgements in this highly personal field in conjunction with no other person than her private physician.

I strongly hold from my experience in providing medical care to women for over thirty years that no persons, no committee, no court, no political body can possibly substitute in any way for the judgement of the woman in weighing all of the considerations that must be weighed in each individual circumstance of pregnancy in the complex social order in which we now live. Since New York

State law made the pregnancy termination decision the right of the patient and her physician to determine, I have been very personally involved in directing medical services that have provided abortion care, and I have been personally involved in rendering these services to a large number of patients. I can tell you for your personal information that almost without exception each woman who faces this question agonizes over the decision. All aspects (personal desires, economic status, social and interpersonal situations, timing of the occurrence in relation to multiple personal and family goals, religious belief, family religious views, advise of friends and physicians, age, recent exposure to potential toxins, family history of congenital malformations, prior birth of malformed infants, etc.,etc.) all come to the fore as considerations by different women in different circumstances before a decision to undertake abortion is reached.

Hence, I concur with all my soul and being that this most intimate and complex personal decision cannot be based upon a scientific definition of when "new life" begins. Life as we know it biologically is a continuum - and the sperm and the ovum individually and independently are part of the continuum of human life. The ultimate reductio ad absurdem in the current discussion and hearings would result in the assignment of a definition of life to every sperm and every ovum. And, as you are aware, there are those among the supporters of S.158 who would legislate against present effective methods of contraception just as vigorously as they would legislate against the Supreme Court decision in Roe v. Wade. The position of the supporters of S.158 pretends that sexual abstinence can be a mode of life for all persons. Since there is no other absolutely effective method of pregnancy prevention, that position contradicts all of human experience throughout history.

And it must be remembered that abortion will be obtained by women forever in the future as it has been as long as our historical records extend into the past. Women have always risked their lives to end unwanted pregnancy and it is quite clear to those of us who have cared for women that they will continue to do so.

I know that a great deal of scientific debate will take place during the scheduled hearings concerning biological life, its beginnings and continuum, and the relationships between biological life and human personhood. One aspect of this evidence will point to the obvious fact that there is a major gap between fertilization of the human egg and the birth of a human person. Firstly, scientific data indicates a range as large as 40-70 percent of all fertilized human eggs failing to reach maturity and resulting in infant birth. In addition, to the large number of ova which are lost so early after fertilization that they may scarcely be recognized as "pregnancy" except by sophisticated research methods, 10-15 percent of recognizeable pregnancies are lost within the first three or four months of diagnosed pregnancy and an additional small percent are lost throughout pregnancy from a variety of causes which effect the infant in the later stages of development. A number of these, of course, are congenital malformation problems so severe as to be incompatible with continued extrauterine life - either for any duration or at least not for extended duration.

To summarize, I support wholeheartedly the Supreme Court decision in Roe v. Wade - and am convinced that the Supreme Court acted wisely and left the competing moral, ethical, philosophical, and religious aspects of the decision to terminate or to continue the state of pregnancy with the person who is experiencing that pregnancy; namely, the woman concerned. That decision I believe is the one that is most compatible with the high purposes of our Constitution in protecting liberty and freedom for all. It is most important in this connection to note that nothing in the Supreme Court decision exerts any coercive influence on any person in regard to this entire question. On the contrary, the status which existed prior to Roe v. Wade and to which S.158 would have the Nation return, is extremely coercive upon every woman who chooses not to continue pregnancy through childbirth - either she must accept the coercion to bear a child against her will, or she must accept all the risks and potential punitive actions of obtaining abortion outside of legitimate health care services. Similarly, those providers of abortion services who may feel sympathetic to the need to continue the services whether legal or not would be exposed to whatever legal penalties may be imposed. While it clearly is irrelevant to the moral, ethical, or religious aspects of this debate, there is a mountain of evidence that such action and practice was widespread prior to 1973 even in the United States, is widespread now in parts of the world where those same conditions prevail, and that under such conditions, maternal mortality is excessive, even catastrophic, and that the costs in financial terms and in human misery in areas in which abortion services must be obtained outside of the law are virtually immeasurable.

Thank you for the opportunity to communicate these thoughts and convictions.

Very sincerely yours,

DSwartz

Donald P. Swartz, M. D.
Visiting Professor of
Obstetrics-Gynecology

DPS/wds

P. S. I have enclosed a historical review of this problem which contains a valuable list of references including five personal publications in the field.

The Impact of Voluntary Abortion on American Obstetrics and Gynecology

DONALD P. SWARTZ, M.D.

Prologue

The right to abortion is the foundation of Society's long struggle to guarantee that every child comes into this world wanted, loved, and cared for. The right to abortion, along with all birth control measures must establish the Century of the Wanted Child. . . ." Lawrence Lader (1).

Our American founding fathers enshrined in our Declaration of Independence the magnificent dream of the pilgrim immigrants in the words, "The right to life, liberty, and the pursuit of happiness." However the concept that a right to healthy life coexists with other rights and that it imposes obligations on governments and other social organizations has developed much more recently. Those who wrote about the rights which seemed crucial around 1776 could hardly foresee the succeeding 200 years of scientific and technical achievements in the treatment and prevention of disease, nor could they even dream of the magnitude of the economic impact of those advances. With a continent to be populated and with the maternal and infant mortality rates of the day, the problem of a "population explosion" was inconceivable. Thus, over the next century the major concerns in relation to any intervention in a pregnancy that was not desired were toward avoiding maternal death. The legal, moral, and social climate created as a result of legislative actions in the nineteenth century flowed over into the twentieth century and conditioned the education, the philosophy, and the patterns of practice of most of the physicians actively practicing in North America in the 1950's and 1960's (1–4).

From the 1930's to the 1950's, as urbanization proceeded rapidly, the magnitude of the induced abortion problem began to weigh heavily in the statistics of departments of obstetrics and gynecology, and of urban departments of health such as that of New York City (5–7) and the physicians who were closest to the problem began to write extensively of its toll of suffering and death (7, 8).

Of course, Margaret Sanger had begun her efforts at organizing birth control services and disseminating information in 1912. But it required 53 years of sorrowful American history in this area before the United States Supreme Court affirmed a basic right of privacy, and by that decision rendered unconstitutional a myriad of state laws and other rules and regulations which interfered with the dissemination of information and services related to birth control.

As far back as 1936, the historian Norman E. Himes was able to survey the progress in the dissemination of contraceptive knowledge and practices, and

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devoted two chapters of an exhaustive work to the concept of "democratization of birth control." Himes clearly documented that "the desire to control conception is a well nigh universal phenomenon." He concluded his historical treatise with these cogent words: "These moves are in the right direction; even if they have been unduly delayed. We may yet catch up with Soranos, Aetios, and the Arabians and Persians. Who knows? Whether the curve of history will be projected into the future now depends on the physicians and on the kind of support they get from the general public and especially from legislators" (9).

Since the majority of American laws which addressed the question of pregnancy interruption permitted it only when the pregnancy was deemed to threaten the life of the mother, the middle decades of the twentieth century saw the origin of the concept of committees for therapeutic abortion (2, 10). This pattern of collective decision-making developed to provide support for the practitioner who performed the procedure; namely, the support of a recorded decision of a committee of consultants who confirmed by majority or unanimous action that a threat to the life of the mother did, in fact, exist. The structure and rules of function of these committees became a part of hospital medical staff bylaws and departmental rules and regulations, as well as subjects for review by various accrediting agencies.

Hall (11) emphasized the great variation in the manner in which these committee activities functioned in different institutions, and indeed in the same institution according to the economic status of the patient, or according to the physician from whom the patient happened to be seeking her care, etc. In surveying 60 hospitals throughout the country, Hall found an abortion to delivery ratio from one in 20 to one in 4,161 in private services, and from one in 138 deliveries to one in 4,339 deliveries in ward services in the same hospitals. The mean ratio for all private patients, however, in these hospitals was one abortion to 300 deliveries, and the mean for all ward patients was one abortion to 945 deliveries. There were, of course, hospitals that reported no abortions for either ward or private patients. In another group of university services which did not involve private patient care the abortion to delivery ratio was one abortion to 1,417 deliveries.

Hall concluded: "The obstetricians of America must individually and collectively review these vital issues in an effort to establish a more uniformly humane birth control ethic."

A vast amount of medical, general public and political effort before and after the establishment in 1965 of the right to contraceptive information and services culminated in the emotion-packed switching of the vote of one New York State Assemblyman from "NO" to "YES" on April 9, 1973. This vote led to New York State enacting abortion legislation which fundamentally made abortion until the 24th week of gestation a matter to be resolved between the patient and her physician alone. With no requirement that the patient must be a resident of New York State to obtain this medical service, citizens from many other states as well as New York State's own residents used this new freedom in very large numbers (12).

While some other states in the nation had preceded New York State by several years in the matter of adopting some liberalized form of abortion legislation, no other state had made such a clear and sweeping decision in favor of treating abortion like any other medical decision, as a matter to be decided strictly between the patient and her physician. On January 22, 1973, the Supreme Court of the United States rendered decisions in the abortion question which were essentially consistent with the New York State indicating only that in the second trimester of pregnancy states might properly establish regulations concerning abortion as long as such regulations were designed only to safeguard the health of the mother.

The Philosophical Impact

The wide range of differences in abortion practice in different institutions and within the same institution for different practitioners or different economic levels of patients was not maintained without considerable stress and strain on the organized and personal relationships among physicians, not to mention the stresses on the processes of rationalization and justification by individual physicians (2). It is highly probable that those institutions and physicians who adhered most rigidly to criteria for pregnancy interruption consistent with the laws which specified a threat to the mother's life as the sole indication for pregnancy interruption were the most comfortable with the status quo. Many institutions performed pregnancy interruptions infrequently, usually for far advanced medical disease or for some very narrow set of psychiatric indications usually requiring a bona fide act of attempted or threatened suicide as proof of the gravity of the psychiatric illness. While many individual physicians or entire staffs did not agree with the legal strictures, they practiced what the law required and taught that pattern of practice to cadres of new specialists in the field (2).

However, where members of medical staffs individually or in large numbers began to question that rigidity, they began to seek and find support primarily from their psychiatric colleagues on therapeutic abortion committees, who were willing to certify that the pregnancy was a threat to the life of the pregnant woman in circumstances where the threat of or attempt at suicide was not so overt. Psychiatrists and obstetricians became partners in their efforts to meet the need of larger numbers of women to terminate unwanted pregnancy—and to endeavor to do it within the medical care system. In the soul-searching that went on in that era, the question not infrequently was asked: "If I decline to assist this woman in abortion procurement through normal medical channels, and thereby she seeks abortion from an irregular practitioner, and since I understand the risks of her procuring an abortion in that way, is it not true that the pregnancy comprises a risk to her life?" In some such manner, as indicated in Hall's survey, some hospitals and staff met the abortion needs of larger numbers of women while others met the needs of very few or none at all (10, 11).

The contrast to the situation which prevails in New York State since 1970 and increasingly everywhere since the U.S. Supreme Court decision in 1973, can hardly be overstated. Increasingly, abortion can be dealt with in a manner that is very nearly identical to that of other urgent medical care situations. Now, the physician no longer needs to rely on hypocritical subterfuge. He needs only to search his own conscience as to whether or not he properly and sympathetically can render a high quality of service to the patient who requests a pregnancy termination—and then in each individual case be reasonably certain that he is acting in the best interests of that particular patient and in response to her voluntary request. As with other medical care situations, if he can never perform the procedure, or if in this circumstance it is his judgment that the procedure should not be performed, he can in accordance with good medical practice refer the patient to other sources of consultation and advice for the problem which she presents.

I have described all of the above at length because the impact of this new situation with respect to pregnancy interruption (and with sterilization and contraception) is not just like a breath of fresh air—but indeed is a veritable and steady trade wind sweeping away decades of confusing and degrading dialectics in this whole area of medical practice.

It has been both interesting and disappointing to observe some of the difficulties experienced by physicians trained under the previous rules as they strive to adjust to this new atmosphere. Some of the imagined and real problems related to the early concentration of abortion demand in a relatively few locations throughout the country. Physicians in those settings experienced unusual workloads, and thus developed concerns about the deterioration of other programs of patient care, and deterioration of the quality of training in obstetrics and gynecology. The redistribution of abortion care throughout the entire country following the US Supreme Court decision will certainly alleviate this problem of abnormal workload. The same logistics problem affected all staffs, and particularly on conscientious nursing personnel, who found the burden of high volume of abortion care monotonous and repetitious. Such staffs often developed negative feelings about abortion based upon the excessive workload, and not because they objected to the general principle that a woman who wished to have an abortion should have the opportunity to do so. Of course, ambivalence between stated and intellectual approval of the new philosophy versus deep-seated emotional feelings developed through years of adherence to a different philosophy was not always easy to alter. This ambivalence has tended to make many persons from the disciplines of nursing, medical social work, and obstetrics and gynecology feel that the woman requesting termination of pregnancy automatically requires very sophisticated counseling. That all of us experience many life situations in which the sympathetic understanding, and perhaps professional counseling, of others would be helpful is undisputed—and that in our present culture many such experiences are "toughed through" without such help may only mean that an opportunity for personal growth and strengthening was missed. Nor can one deny that the occurrence of a pregnancy in circumstances in which it is not desired is a disturbing experience—and that a decision to terminate the pregnancy certainly poses an opportunity for a great deal of personal help and guidance.

However, some of the rationale advanced by advocates of extensive pre and postabortion counseling is faulty. The evidence has grown with the passage of time and with the very large volume of abortion services rendered that there are few (indeed almost no) serious emotional or psychiatric sequelae which can be traced directly to the decision to terminate an unwanted pregnancy, or to the implementation of that decision. On the other hand, there is strong evidence that the continuation of pregnancy which has not been wanted through refusal to concur in a request for pregnancy termination can and does produce undesirable results (13).

The Medical Impact

A most important and dramatic immediate impact of nearly universal availability of medically safe abortion services has been a substantial decline in the level of indices traditionally used to indicate the quality of maternal and newborn care. Pakter and many others have begun to document in convincing fashion declines in the maternal death rate related to abortion and, surprisingly, declines of comparable magnitude in maternal mortality from nonabortion causes (12, 14). Similar reports are emerging with respect to declines in perinatal mortality (15). It has long been recognized that both maternal and newborn risks in out-of-wedlock pregnancies are increased. For the first time since records have been maintained, New York City data indicate decreasing rates of out-of-wedlock births, thus giving promise of even further and sustained declines in the levels of maternal and infant mortality and morbidity rates (12). It is clear that the obstetrician/gynecologist will no longer need to devote very much effort to saving the life of the woman who has procured a clandestine abortion either by some grossly traumatic manipulation, or who has remained secluded after the initiation of sepsis until pelvic infection had reached such an advanced stage that not even the most modern and heroic measures could salvage all; both types of patients are rapidly disappearing from the scene (16-19).

Abortion under medical auspices is not an innocuous procedure. Indeed, it is the conviction of many within the medical profession that the political campaigns waged to change abortion legislation misled, through exaggeration of simplicity, many women to underestimate very real medical problems which persist despite the many technical advances in the performance of abortion.

Actual maternal mortality resulting from interruption of pregnancy by suction or D and C during the first trimester is extremely small—0 in 170,519 abortions in New York City in the second year of its program (12) or 1 in 56,273 abortions in the Joint Project for the Study of Abortion by Tietze (20).

The major complication rate in the JPSA survey was 0.6% for patients having suction abortion procedure only, who resided locally, and who had a follow-up report available. The major complication rate for patients having saline abortion was 2.4% (20). It is encouraging to note that the overall mortality rates have declined with the passage of time as the entire medical care system became more familiar with the problems surrounding abortion and the modern technology associated with it—e.g., from 4.6 deaths per 100,000 abortions in New York

City the first year to 3.5 in the second year (12). Tietze also observed sharp declines in all suction complication rates over 12 months of JPSA reporting (20).

Of course, the greatest contribution to safety takes place as women learn to seek early pregnancy diagnosis and make early decisions concerning their wishes for termination or for pregnancy continuation.

The most recent thinking and practice in this area is the procedure called "menstrual induction" or "menstrual extraction." The former term is favored by those who are convinced of the advantage of inducing menstruation either routinely or whenever it is delayed past its expected onset, even without the confirmation of presently available pregnancy testing. Others in the profession continue to feel that the decision to invade the uterine cavity with an instrument should be based upon better evidence than menstrual delay. It is probable that most in the field reject the concept of routine menstrual induction simply for menstrual and social convenience.

The legal approval of voluntary interruption of pregnancy has undoubtedly advanced the medical and surgical technology of pregnancy interruption. Much of the rapid progress in the evaluation of the possible role of prostaglandins in pregnancy termination would have been impossible, at least in America, without the changed legal climate of the past several years. The current generation of obstetrician/gynecologist trainees has received training and experience in pregnancy interruption which far exceed in most instances the experience of their teachers. The new obstetrician/gynecologist has a first hand experience based upon large numbers of pregnancy interruptions—an experience which has provided superb technical skills in amniocentesis, vacuum evacuation of the uterus, assessment of complications occurring with such procedures, and a flexible awareness of the varied approaches which work effectively when complications of these procedures occur.

There are no definitive reports of prospective studies which specify the long term complication rates of voluntary abortion by present techniques. We need to know whether or not the performance of one or more voluntary abortions affects the subsequent rates of a number of undesirable complications of reproduction—and if it does, the extent of the changed risks of: a) involuntary infertility; b) ectopic pregnancy; c) incompetent cervical os and mid-trimester abortion; and d) unsatisfactory outcome of pregnancies carried beyond the mid-trimester; that is, low birth weight infants, or other pregnancy, labor or delivery complications. These rates will be meaningless unless they are compared with control groups of women who are known with great certainty not to have had voluntary abortion. The studies will need to go forward from approximately the present time with patients who are receiving the benefit of current abortion practices—not even those which were in effect two or three years ago. It would seem reasonable to assume, for example, that the less forceful dilatation of the cervix that is required, the less might be the subsequent risk of cervical incompetence or complications of the later period of desired pregnancy. The use of laminaria for more gentle cervical dilatation is only in its infancy in this country. Similarly, if cervical dilatation is not required at all (as in the menstrual induction technique with a 4 or 5 mm soft plastic cannula) the risks of introducing even minimal infection may be less than in procedures that require any substantial cervical dilatation—and thus secondary infertility rates may be expected to be lower as less traumatic procedures become more widely available and applied to earlier gestations. The same may be true if parenteral or vaginal prostaglandins become acceptable abortifacients.

The question is frequently asked: "Will abortion availability reduce the utilization of contraceptive measures?" On the basis of available evidence, there is thus far no reason to believe that women who have equal access to a full range of contraceptive services will elect repeated abortion in place of such preventive measures. In Harlem Hospital, family planning clinic visits increased 25% in the first 12 months following introduction of abortion services (14). Women will continue to strongly prefer pregnancy preventive measures to pregnancy termination unless some major evidence arises to change our present knowledge concerning the risks involved in the use of the two most effective contraceptive methods—the intrauterine devices and the oral contraceptive agents. One other factor which might change present use patterns significantly would be a campaign of gross misrepresentation with respect to the comparative risks. Thus far, even the most sensational claims regarding risks involved in the use of these two effective and highly acceptable preventive measures have consistently failed to influence their use except in a transient manner.

Only time will answer the question of whether women generally will begin to develop a reliance upon abortion instead of upon contraceptive measures. Another beginning indication that such is not the case emerges from a review of residents of New York City who have had their second or later abortion since voluntary abortion became available July 1, 1970. During the 12-month period July 1, 1971 through July 30, 1972, repeat abortions comprised 3.94% of 63,783 abortions reported from New York City residents. A sampling of the total repeater group indicated that only 47.3% were not using a contraceptive method. And of those not using methods, an analysis of the dominant reason given for non-use suggests that approximately 70% would have been using a method if they had received appropriate counseling assistance and/or services (21).

The total impact of abortion discussion and practice will lend even greater support to efforts to more safely and effectively prevent the occurrence of unwanted pregnancy. The anti-abortion debate and the real problems associated with abortion should give impetus to the increased allocation of research support into the mechanisms of human reproduction and to the search for more effective and safer contraceptive methods than are now available. It should also provide leverage to orient the distribution of contraceptive supplies (especially nonprescription items) toward consumer needs.

The Social and Economic Impact

The legal situation which rendered some states and the cities within them focal points for abortion services caused the entrance into the health care delivery system of persons and organizations which would not otherwise have been so involved. Persons who had not previously had access to health dollars found ways to derive "referral fees," transportation fees, abortion clinic management incomes, and profitable excess incomes from employing part-time physicians as technicians in their abortion facilities. But as abortion services become more widespread, these opportunities for making excessive profits through the delivery of abortion care are diminishing.

The pluralistic nature of abortion services which developed has served to modify the price structure in the patient's favor. But the location in which the majority of future abortion services will be rendered cannot be clearly foreseen. It seems probable that in the relatively near future the earliest procedures, (termination of pregnancies up to about 45 days' amenorrhea), will become very commonly performed office procedures, whether or not the medical establishment agrees that that is the best location for the procedure. The fact that the economic overhead is lowest in the private office is an important factor; but also the simplicity and privacy of a visit to a physician's office contrast so strongly with the complexity of procuring a brief operative procedure in many of our hospitals, especially in the larger ones.

The factors of the delivery of abortion services in locations other than conventional hospitals, the involvement in abortion care of many citizens who had not previously been associated with health care in any way, the emphasis of various women's movements towards emancipation of women from all-male dominance (including the dominance of male physicians), and a widespread interest throughout the health establishment in expanding the roles of non-physicians in health care delivery converged to create pressures from some quarters to train non-physicians in the actual performance of abortion procedures. While it is possible to train people with widely different backgrounds to perform specific technical tasks as part of a broadly competent medical and health team, the prospect of persons with limited technical skills assuming independent responsibility for surgical and/or other health care of the patient without continuing supervision and continued learning is a development that will serve badly the cause of pregnancy termination and a range of other health services. The performance of pregnancy termination by current methodology involves complications, which, although of low frequency, may be dramatic and may require all of the health team in an acute care institution with specialist skills in anesthesia, shock, pelvic surgery, urology, etc., to preserve life and reproductive function.

If one were to accept the New York City situation as a base for projecting approximate number of abortions to be requested in the next several years (22), it is difficult to imagine why the United States should require nonphysicians to undertake this surgical procedure. Considering that New York City has had in many areas rather strong family planning programs, but also that it has large numbers of citizens who are disadvantaged socioeconomically, it seems reasonable to accept the 1971 abortion-to-live birth ratios as intermediate compared to other more or less advantaged areas of the USA. The abortion-to-live birth ratios in New York City in 1971 were 372.9 for white residents and 562.8 for non-white resident (12). If one applies these ratios to a hospital service that accomodates a delivery volume of, let us say, 3,000 births annually, the problem becomes one of handling roughly 1,000 to 1,500 operative procedures annually—

or four to six 15 20 minute procedures per working weekday— a very small work-load indeed. And that volume of hospital abortion work may be reduced as office procedures become more widely practiced and as contraception knowledge and use increase.

In the wider social arena, the impact of ceasing in the main to bear and rear children who have not been truly wanted surpasses the foresight of even those trained in the study of social pathology. It has never been possible to calculate the social cost of unwanted childbearing, especially in urban America where such a large proportion of it has been associated with single parent child rearing. But it is certain that the beneficial social impact of childbearing by choice will have a parallel impact upon obstetrics and gynecology, and in time will reduce the frequency with which many pathologic conditions are seen.

Epilogue

The semantic controversy over the use of the words abortion, contraception, birth control, family planning, and planned parenthood will probably not abate quickly. Pragmatically, of course, "birth control" is what the individual woman or couple has as their ultimate goal; and, whether verbalized in those words or not, that is clearly what the individual means when the words "family planning" or "planned parenthood" are personalized to her or his own life situation. But it seems certain that the moral, legal, and political debates, particularly as they focus on the use of public funds for providing pregnancy prevention services versus pregnancy termination services, will continue to waste human energy in emotional and semantic discussions. But the impact of widely available voluntary abortion as the ultimate mechanism of "family planning" when conception prevention measures have failed, for whatever reason, will eventually reduce the importance of the semantic aspects of this debate.

The information gathered by Bumpass and Westoff (23) indicated that in the years 1960–1965, before voluntary abortion had become significant within our medical care system, births to married women occurring in that five-year period were unwanted by both spouses at a rate of 17%, and unwanted by at least one spouse at a rate of 22%. We shall never know the extent to which women at that time utilized nonmedical sources for abortion procurement. However, it seems certain that more socially acceptable abortion services within the medical care system (combined of course with constantly broadening availability of contraceptive services and information) will cause a marked decline in the high proportions of births described as "unwanted." And this will apply to persons of all ethnic and religious groups as it appears that women seek birth prevention on the basis of personal perception of their individual need for it—and do not conform to prohibitions publicly enunciated by secular or clerical leaders (24).

The impact which abortion may make in the short term on the absolute number of births in the U.S. probably is quite considerable. Tietze has calculated that in New York City, adjusting for changes in age distribution of the female population, the annual number of live births between 1970 and 1972 declined by 25% (37,800) and his estimations attribute about one-half of that decline to legal abortion (25).

Considering the apparent advantages (combined social and obstetric) to childbearing in the 20–29 year age group, it seems certain that obstetric complications of pregnancy will decline in frequency, (26, 27). A growing demand for a perfect and planned reproductive experience places new needs for exacting quality control upon the discipline of obstetrics and gynecology, but also generates in our patients a very high level of receptivity and cooperation with recommended regimes of care. These salutary attitudes of patients bearing planned and wanted pregnancies are in marked contrast to the fatalistic disinterest of many higher parity women who previously crowded our public prenatal clinics for their almost annual relatively unwanted births.

The frequency of long-term psychiatric complications of voluntary abortion, extremely small even at present, will be further reduced as the overall social climate becomes more accepting of abortion as a part of normal health care throughout the nation. Differences in the way that abortion is regarded by the administrators of fiscal reimbursement mechanisms (insurance, Medicaid, etc.) tend to perpetuate a certain level of collective guilt or feeling of inappropriateness with respect to this type of health care—and the removal of these differences of treatment would be another step toward ensuring that the patient seeking abortion care was treated in exactly the same manner as a patient seeking any other kind of health service.

The practice of contraception may undergo a gradual change with the broad availability of voluntary pregnancy interruption. In the climate of the late 1950's and early 1960's, when abortion was relatively unavailable, a near-zero pregnancy failure rate was an important, indeed indispensable, criterion for an acceptable contraceptive method. The known pregnancy rates with the intrauterine device were recognized by family planning clinic administrators to be substantial deterrents to a wider acceptance of the intrauterine device. It seems probable that when voluntary abortion is generally available, hormonal or intrauterine device methods of contraception (or methods not yet in use) which have negligible rates of demonstrated discomfort or complication to the user may become more acceptable, even if pregnancy failure rates with such regimes are slightly higher than the failure rates experienced with current widely used pills and devices.

The impact of Lader's "Century of the Wanted Child" promises to greatly enhance the opportunities of the obstetrician-gynecologist to become the leader of the primary and comprehensive health care team for women. For decades in the forefront of preventive or "health" care but now increasingly freed from many of the acute surgical and technical problems of the past century (7, 28), the obstetrician-gynecologist will strengthen skills already being practiced and will cultivate new skills to aid women to develop and maintain normal health and function.

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June 24, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus,

Please forgive my delay in responding to your May 13, 1981, letter asking for my input on Senate Bill 158, a bill designed to "provide that human life shall be deemed to exist from conception." I would before responding to the letter apologize for the delay in writing, but would indicate that I dictated this letter some time ago, only to find that I lost the tape and, as a consequence, a response never reached you. I would also like to thank you, once again, for all that you did for the WAMI Program in Montana when I was Director of that Program at the University of Washington. Frank Newman, Marshall Cook and I always knew that if we needed help, we could always call you and receive an immediate response.

With regard to the issue which you face, you undoubtedly know, this represents severe dilemma for all who must confront it. There are as many definitions of when "life" begins as there are individuals. These extend back to the time of St. Augustine.

Suffice it to say, however, that from a biological standpoint, the process is a continuum from conception and will if allowed to proceed, lead to the "birth of a human being". There is no point in that continuum when one can, with scientific validity, say that "before this point a fetus is a biological organism and after it, it is a human being". There are no stop or starting points in the continuum after fertilization of the egg by the sperm and its implantation. One has "biological life" throughout the continuum.

The issue then can be reduced to a single question as follows: "Is this biological life, the same as or equivalent to human life?" To answer this question one must decide what is "human." This decision is not a scientific issue. It lies outside the realm of science and is not subject to scientific analysis and, hence, cannot, nor will it ever be answered by science. This issue falls into the arena of human endeavor normally referred to as philosophical, educational, ethical, religious, moral, etc. In the same way, we cannot analyze love, charity, sympathy, hate and anger by scientific or biological yardsticks. These areas of human endeavor lie outside of science.

Given the above, another way to state the same issue is, "When does human life begin and end?" Whatever one concludes on this issue, the conclusion must be defended on non-scientific grounds. It must, however, be internally consistent, logical, and intellectually honest. It should, in this regard, be clear that what one applies to the "unborn" fetus must be applied throughout the continuum of life from conception to death. It is ethically, morally, and intellectually indefensible to change one's definition of "human life" from one point on the spectrum of human existence to another. It is necessary to be consistent regardless of whether you are dealing with a fetus, a retarded teenager or a senile, elderly person.

In the final analysis then, the answer is a personal issue to be decided by ones own references and moral code. While we do not offer people complete and unlimited freedom to define their own moral code (eg. we don't accept murder as being morally acceptable), we do provide great latitude in decisions in this area. It is for this reason that great caution should be exercised in committing this "nonscientific issue" to statute form.

As an individual and private citizen, I have an opinion on what is human life, when it begins and under what circumstances it can/should be terminated. I would, Senator, if you would like, be happy to share with you my personal opinion on this issue if that is desirable over and above what I've outlined here. It would probably not surprise you to find that in general I do not believe that legislative bodies should be in the position of defining issues of a moral or ethical nature in this arena. However, I will not continue along this vein unless you desire it.

Again, thanks for your help in the past.

Sincerely,

M. Roy Schwarz, M.D.
Dean

MRS:ad

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June 2, 1981

The Honorable Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

Thank you for your letter of May 13, 1981. I shall make an effort to answer your questions as best I can.

1. I do not believe that the question of human personhood is a medical and scientific question.

2. The question of human personhood is in fact a moral - philosophic - religious question. I sincerely hope that it does not become a political question, since this could become extraordinarily destructive to the care of patients.

3. Medical and scientific data alone cannot determine the definition of human personhood.

4. The impact of S. 158 if enacted is very difficult to predict, and probably would depend upon the Court's interpretation of the law. If this bill were enacted and were used to block the performance of abortion, its effect on the women of this country would be absolutely devastating. Prior to the availability of legal and safe abortion, gynecologists in this country were faced with a constant barrage of seriously infected women who had been subjected to illegal, nonmedical abortions. With the change in the sexual mores that has occurred since that time, this problem would be even worse. I do not believe that making abortions illegal will result in no abortions being performed; rather, it would simply transfer the performance of abortions from competent medical hands to the nonmedical abortionist, and result in an enormous increase in both morbidity and mortality of young women in this country.

5. Should this bill be enacted, I believe there is a significant possibility that genetic screening would be adversely affected, and certainly some contraceptives, including the intrauterine device, might become illegal.

In summary, I believe that the effect of this bill would be devastating if the Court should interpret it as banning abortion. It is my sincere hope that this bill will not pass, since I believe it would have an extremely detrimental effect on the health and safety of women in the reproductive age groups in this country.

Sincerely,

Luther Talbert

Luther M. Talbert, M.D.

LMT/scb

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1981 MAY 27 AM 10: 12

May 18, 1981

Senator Max Baucus
Cannon House Office Bldg.
Washington, D.C.

Dear Senator Baucus:

This letter is being written to express vehement opposition to the Helms-Hyde Statue #S-158, HR 900.

It is blatantly unconstitutional and violates separation of powers, right to privacy, and separation of Church and State leading to a reinterpretation of the Bill of Rights. Women in this country refuse to return to illegal, back-alley butchering abortions. We refuse to condemn to death thousands of women each year and countless others to be psychologically and physically scarred by these illegal procedures. Poll after poll proves that the majority favor a womens' right to choose. We find it inconceivable that our government could even consider persecuting and victimizing women in such a self-righteous and callous manner.

It is our sincere hope that you will join us in opposing this, and any legislation aimed at depriving women and proper medical care of basic human rights.

Sincerely,

MIRIAM TASINI, M.D.

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Henry A. Thiede, M.D.
Professor and Chairman
Department of Obstetrics–Gynecology
716-275-5201

1981 JUN -4 AM 11:17

June 1, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I believe the question of human personhood is both a scientific and a philosophical question which has major medical and political overtones.

There are no concrete scientific or philosophical data with which to establish the onset of personhood; the prevailing evidence indicates that it is not at the time of conception.

The implications of S.158 clearly indicate a serious negative impact on the current trends of medical genetics as well as a profound effect on the psychosocial aspects of our society. I'm not sure that this is all bad, but I believe S.158 should not be enacted because it cannot stand on its own merit, not because of the potential negative impacts it would undoubtedly generate.

Thank you for asking.

Sincerely,

Henry Thiede

Henry A. Thiede, M.D.
Chairman
Obstetrics-Gynecology

HAT:ls

TESTIMONY BY CHRISTOPHER TIETZE M.D. CONCERNING THE IMPACT OF S.158 ON WOMEN'S HEALTH

My name is Christopher Tietze and I reside at 120 East 90th Street in New York City. I was born and educated in Vienna, Austria. After graduation from the Medical School of the University of Vienna, I was in practice until 1938 when I immigrated to the United States and became associated with Johns Hopkins University School of Hygiene and Public Health. Following World War II, I entered government service to become Chief of Population and Labor Staff of the United States Department of State. In 1958, I left the government to work for the Population Council. At present I am a Senior Consultant and am primarily concerned with research on the demographic and public health aspects of induced abortion.

I serve on the Board of the Alan Guttmacher Institute and as a consultant to the National Medical Committee of the Planned Parenthood Federation of America. I have been a member of the Advisory Committee on Obstetrics and Gynecology to the Food and Drug Administration and of the Governor's Commission to Study Abortion in New York State, and have served on seven scientific groups of the World Health Organization concerned with human reproduction. Since 1973, I have chaired the steering committee of the WHO Task Force on Sequelae and Complications of Induced Abortion. Over a period of 50 years, I have authored or co-authored about 250 scientific reports in the fields of demography and public health, mainly on human fertility and its regulation, including more than 90 articles on abortion.

The number of human ova fertilized during one year in the United States is on the order of about 20 million. Three-fourths of these fertilized ova perish without a trace; only about 6 million establish a pregnancy. Of the 6 million pregnancies about 1 million end in miscarriage or stillbirth, about 3.5 million in live birth, and 1.5 million are terminated by abortions, most of which are currently performed legally and safely in medical settings. Of the 3.5 million live births, about 2 million are intended at the time of conception and 1.5 million are unwanted or at least mistimed.

The obvious purpose of S.158 is to enable and indeed encourage the States to outlaw abortion. Making abortion a crime will not make it disappear but would once more drive it underground. Assuming that one-half of the 1.5 million women who today can rely on safe legal abortion services would turn to illegal services, one would expect about 750,000 or 50 percent more unwanted or mistimed births and 750,000 illegal abortions, including many performed by unqualified practioners in nonmedical settings, equalling the estimated annual number of illegal abortions in the 1960's.

The public health aspect of illegal abortion can best be explored in terms of mortality and morbidity, that is, major complications. In the late 1960's, prior to the legalization of abortion in New York State, deaths after illegal abortion in the United States occurred at a rate of at least 110 per year. Over the next several years the number of such deaths declined steeply to about 20 in 1973 and to a low of 2 or 3 in 1976. This decline was followed by a rise to 7 deaths in 1978, after the 'Hyde Amendment' had restricted access to legal abortions for poor women in most of the States.

In my considered opinion, outlawing abortion would result in about 150 additional deaths of women of reproductive age. Mortality, however, is only the tip of the iceberg as far as public health is concerned. It is difficult to estimate the number of major complications, such as hemorrhage, infection of the genital organs, and major surgical interventions that would result from the outlawing of abortion. The most plausible estimate would be on the order of 125,000. Major complications on this scale may be acceptable to women who are looking forward with joyous expectation to the birth of a wanted child; in my opinion they are clearly unacceptable in the case of pregnancies which were unwanted in the first place.

Making abortion a crime would impose the heaviest burden on young, poor, and black women because members of these groups would be least able to afford the services of qualified illegal practioners, and would be forced to rely on less expensive services, to attempt self-abortion, or to bear unwanted children. According to the most recent statistics, about three out of five women obtaining legal abortions in 1979 fell into at least one of these three categories. Many women in the disadvantaged groups obtaining illegal abortions would be further jeopardized by delays due to lack of funds, because the risk of major complications increases by about 20 percent for each week of pregnancy.

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April 27, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus,

Thankyou for your letter of enquiry concerning the hearing by the Senate Judiciary Committee's Subcommittee on Separation of Powers concerning S.158. Amongst my qualifications for responding as a medical and scientific expert are that since 1971 I have taught a course on "Development Before Birth" in the UCLA School of Medicine, and that between 1954 and 1971 I taught courses in Human Embryology in the Department of Anatomy at the University of Cambridge, England. The chairman of that department was J.D. Boyd, co-author of the textbook Human Embryology (by Hamilton, Boyd and Mossman) and one of the most distinguished developmental scientists of this century.

My answer to your three questions are as follows:

1. Do you believe that the question of human personhood is a medical and scientific question?

Answer: No. Medical and scientific observations cannot be philosophically "compelling." Objective observations of natural phenomena are clearly relevant in all decisions. But such data merely provide the basis for philosophical and theological reflection and decision.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

Answer: Yes.

3. Would you agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context?

Answer: Yes.

In general, it has been clear since the work of Pasteur that "spontaneous generation" is a myth, and that all living forms today have arisen from previously existing living forms. The egg and the sperm are both "alive" prior to and after their union. The "Preformation Hypothesis," which was widely accepted in the scientific community in the eighteenth century, has long since been abandoned. That hypothesis held that the new human being was preformed in either the egg (the "Ovists") or the sperm (the "Animalculists"). The alternative theory of "Epigenesis," which holds that the creature is gradually "formed" out of cells that initially in no way resemble the person to be, was accepted by virtually all thinkers from the time of Aristotle up until the seventeenth century. During the last hundred years its correspondence with observed facts about early embryogenesis has been thoroughly confirmed. The decision as to when, and at what point in development, it is appropriate to refer to this developing creature as an "actual human being" is a matter for philosophical judgment. Science can do no more than describe the facts, though individual scientists are of course at liberty to interpret those facts according to their own philosophical and theological beliefs.

If there are further questions which you would like me to answer, or if you would like me to prepare either written or oral testimony for the subcommittees hearings, please let me know.

Yours sincerely,

Bernard Towers

Bernard Towers, M.B., Ch.B.
Professor of Pediatrics & Anatomy
Co-Director, The UCLA Program in
Medicine, Law & Human Values

BT:jm

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June 1, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am pleased to be able to respond to the issues which you have raised with respect to the consideration of S158. Before responding to your specific questions, you should know that I have carefully reviewed S158 and view this as an extremely dangerous piece of legislation,on legal, scientific and philosophical grounds. Let me attempt a response to your specific questions.

> You ask if I believe that the question of human personhood is a medical and scientific question. I must respond that although biomedical science can illuminate many of the issues which must be considered, the basic question remains wholly in the domain of ethical, philosophical, religious and political judgment. The issue is, of course, a profound one and cannot be dealt with lightly. Nevertheless, even with the illumination that biomedical science may produce the overriding question must be reserved to judgment based on moral consideration which cannot be simplistically defined by any scientific opinion.
>
> I believe that the preceding response also responds to your second and third questions.

The impact of S158, if enacted, would be profound. The potential of criminal liability for physicians for any misadventure befalling a fetus would be so intimidating as to severely restrict the actions of legitimate physicians and to drive much desirable research and treatment into the back rooms of illegal and uncontrolled activities. Determination of ectopic pregnancy would very likely require court intervention, a prospect which in these emergencies is unimaginable. Questions concerning the legal status of a variety of forms of contraception and particularly the inter-uterine devices would seem, under S158, to have no resolution other than to produce liability for physicians, manufacturers and others.

Senator Max Baucus
Page two
June 1, 1981

The complexities of the relationship of the physician with his patient under S158 are immense. An obstetrician who failed to warn a pregnant woman to absolutely cease alcohol intake or smoking because of its potential effect upon the fetus presumability could be liable for criminal prosecution. The interpretations of the manifestations of murder and manslaughter with respect to the provision of S158 are limitless and unnecessary in that the considerable body of the law currently developed and applied to pregnancy would have to be completely rewritten in the courts.

In sum, it is clear to me that the acceptance of this simplistic and destructive piece of legislation would have a profound effect upon the practice of medicine in many fields in addition to obstetrics and gynecology and that what may have been achieved by the proponents of the measure would be paid for many times over in the destructive aspects of the bill.

Sincerely yours,

Robert E. Tranquada, M.D.
Chancellor/Dean

cc: Senator Edward Kennedy
Senator Paul E. Tsongas

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June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Your letter of May 13 concerning S. 158 for some reason was delayed and only recently arrived.

While it may well be too late for my response to be useful, I would like to express my opinion.

I cannot comment as an expert in the field of genetics or reproductive biology; by which I mean that the scientific literature in those fields is unknown to me. For that reason, I must accept on faith the statements of individuals such as Dr. Leon Rosenberg, who testified at Senate hearings.

I must agree with him that the question of human personhood is not a scientific question since it cannot be tested scientifically. It is a philosophic, moral, theologic question. The answer must be left to the philosophic, moral, and religious beliefs of the individual--and each individual is entitled to answer it as he or she sees fit. I find it incredible, as well as ludicrous, that the Congress of the United States would consider stating that"--present day scientific evidence indicates a significant likelihood that actual human life exists from conception." It would be a comparable situation if a bill was submitted which stated that Congress found that there was a significant likelihood that God lives in heaven.

There seems to be no question that conception is essential in establishing the potential for human life. There is question as to the point in time when the potential becomes actual. There seems to be no way to answer the latter. If one believes that fertilization of the egg is the critical point--the point at which two cells become a human being--then one is justified in maintaining that that life must be protected. If one believes that the fetus becomes a human being at birth, then another position is viable. It is a matter of opinion and belief, not of fact. As far as I am concerned, Congress may not legislate my opinions or beliefs.

Leaving the above aside, passage of S. 158 would have harmful effects with respect to human welfare and the practice of medicine. Genetic screening and amniocentesis would be useless, if not prohibited. The use of some contraceptive drugs and intrauterine devices would be unlawful. Almost inevitably, games would be played with further defining the actual onset of personhood (i.e., the fertilized egg must be implanted or there must be 8 or 16 or 32 or 312 cells before actual life occurs).

No good can come of passage of this bill. Outlaw abortion, in and of itself, or leave it to the individual. The latter makes more sense to me.

Thank you for the opportunity to comment.

Sincerely,

Robert L. Tuttle

Robert L. Tuttle, M.D.
Dean

RLT/jd

UNIVERSITY OF CALIFORNIA, IRVINE

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1981 JUN 12 AM 9 11

OFFICE OF THE DEAN
CALIFORNIA COLLEGE OF MEDICINE

IRVINE, CALIFORNIA 92717

June 5, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am responding to your letter with regard to Senate Bill 158. I have watched this entire controversy with considerable interest and regret. It is my personal view that abortion is not infrequently a desirable intervention which is really in the best interest of the mother, the family, the offspring or any combination of these. At the same time, I am extremely conservative in recommending abortion, observing that demand abortion is a somewhat unfortunate development because many of these women come to have profound regrets later in life with attendant psychological problems. At the same time, I do not really believe that the entire decision about abortion can be made by physicians or boards or counselors.

If I had an opportunity to run the world, which is extremely unlikely, I would feel that abortion should be provided on demand but with a proviso that there be impartial and conservative counseling by both the physician and a person with a background in counseling representing either psychiatry, psychology or the clergy.

The current issue is a fascinating one because one can turn it around and look at the arguments about brain death in which there is now a body of law and judicial judgement that a person who has been in an automobile accident or similar injury who has sustained action of the heart and the lungs but whose brain is no longer functioning and can fulfill certain criteria is judged to be dead and a subject for organ transplantation and discontinuation of life support mechanisms. If one would turn that process around and decide at what point the fetus would be judged to have sufficient brain activity in utero to be capable of recording experience and responding to environmental events in a meaningful way and capable of recognizing unpleasant and pleasant stimuli, it is likely that one would have to judge this to occur in the mid-portion of the gestational period and probably around four months. I do not consider myself an expert in fetal behavior but would guess that those who are experts would place that as the point at which one could believe responsive behavior and recording of an experience could begin in the mind of a fetus. As such, I think it would be defensible to perform abortion before this point in time.

It also, of course, should be recognized that conception does not inevitably result in birth and, in fact, it may take many conceptions before there is probability of development. If one were to construe interference with early products of conception as criminal then one would have to accept that nature itself is creating ten of these crimes or perhaps 100 of these crimes for each one that might be an act of man.

In response to your specific questions, I am reluctant to separate medical and scientific issues from moral, ethical, philosophical, religious or political issues. Medicine embraces all of those and contains both scientific and non-scientific components and I am reluctant to divide the question in these terms. The definition of human personhood cannot be made on scientific data alone but it can be made on medical data if one includes within the rubric of medicine the moral, ethical and other issues which are inherent in all practices of medicine.

The impact of S. 158 on the practice of medicine, on genetic screening and the use of contraceptives will be problematic; and fraught with judicial wrangling. It will probably complicate life for patients, for physicians and generally add to the cost of our civilization in non-work.

The views which I express in this letter are personal and do not reflect the opinion of the University or represent a consensus of my faculty but the response time which you required does not permit a more extensive consensus.

Sincere best regards,

Stanley van den Noort, M.D.
Dean

SvdN/sta

College of Physicians & Surgeons of Columbia University
The Presbyterian Hospital in the City of New York

RAYMOND L. VANDE WIELE, M.D.
CHAIRMAN, DEPARTMENT OF OBSTETRICS AND GYNECOLOGY
DIRECTOR, THE SLOANE HOSPITAL FOR WOMEN

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June 10, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in response to your inquiry about my evaluation of S.158. The question of human personhood is neither a medical or scientific question, but in part a moral, ethical, philosophical, religious and political question.

It is my considered opinion that the enactment of S.158 would be catastrophic. It would make impossible the use of a number of contraceptives and would paralyse the amniocenthesis program. Perhaps even more detrimental would be the fact that in deciding an issue that is not within its province, Congress would set a precedent that could lead to pernicious excesses in many other fields. Finally, I am appalled by the fact that a body like Congress may enact a piece of legislation that masquerades as a matter of semantics whereas its goal is to legislate a most controversial matter which is left out of the debate.

Sincerely yours,

Raymond L. Vande Wiele, M.D.
Chairman, Director of Department
of Obstetrics & Gynecology
Director of the International Institute
for Human Reproduction
Columbia Presbyterian Medical Center

RVW:mgf

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1981 JUN -9 AM 9 55

June 5, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. -20510-

Dear Senator Baucus:

Thank you for your letter of May 13th inviting me to submit thoughts on the impending hearings on Senate Bill 158. I received this document, studied it carefully and offer the following reflections.

First, let me indicate that my expertise is in the field of Medical Ethics and not basic biological medicine, legal jurisprudence or any other discipline pertinent to this question. Let me respond to the four queries from the base of competence that I do have.

1.) The question of human personhood is certainly, in part, a medical and scientific question. It is a medical and biological question since new knowledge about cell structure, the nature of germ cells, the nature of the human embryo and zygote are problems discernable only by scientific and biomedical investigation. The ways in which personhood can be identified or extrapolated from this biological substratum is, of course, a more difficult question. One has seen a variety of difinitions when a human life becomes a person ranging from before conception, if you take some of the recent theological positions where being named and finding a destiny posited in oneself is affirmed by the Diety even before conception.(See Genesis 21:1-5). These references in the Bible are frequently being evoked today to promote an extreme right to life at conception view point. Other positions argue that personhood begins when the mother carrying the baby senses a separate living person in her body, at quickening for example. Others would argue that personhood does not occur until the third trimester when a baby can be delivered prematurely and still be viable. Still others would argue that personhood does not begin until birth, after birth or some time later. Personhood itself, therefore, is a question of values and definitions rather than scientific determination. So in summing my response to the first question, yes, it is a medical and scientific question, and it is also more than a medical and scientific question, since empirical and scientific methodology can only respond to a very small section of the spectrum of human knowledge.

2.) I believe my answer to point one addresses this issue.

3.) The answer to question one certainly implies a position on this question. Yes, it must be determined on the basis of science and medicine, and in addition on a broader, deeper considerations.

4.) I have heard all of the prophets of doom saying that Senate Bill 158 will have very untoward consequences in many fields of human health and health care. My general feeling is that these views are overstated. I don't think we will begin to grapple with the question of inheritance rights for miscarrages, or any of the other science fiction constructs that people are coming up with. We live in a realistic society, where, unless we continue to burgeon the number of lawyers, and the zone of human experience that is drawn within the realm of law, legislation and regulation, we should still be able to live with some sensibility and prudence. If we contine to sweep more of human life within the realm of law, legislation and regulation, it could certainly be the case that we will occupy ourselves with trivial, insignificant and even dangerous questions.

In summary, I feel that we do need some articulation of public policy that will affirm the deep historic wisdom of Western Civilization and the American Tradition that conceived life is precious and valuable. We also need to bring a halt to the growing practice of abortion as a methodology of birth control. I take heart from the recent evidence that, even though we have curtailed public funding for abortion in States like Illinois, for example, we have had nine months at Cook County Hospital without wide-spread publicly funded abortions, and the incidence of septic, back-ally abortions has not increased. Even those who decried the original decisions, curtailing funding, now admit that a restrictive abortion policy, although fraught with serious human harm, encourages persons to be more responsible in terms of family planning and contraception.

Finally, I am quite convinced that we need to allow, in public policy and public funding, possibilities for mothers of families who find themselves in situations where the tragic dimension of our life is evident, namely genetic diagnosis, forensic abortion, infants born with severe anomolies, etc., to choose not to perpetuate life when the costs would be so great that it would be devastating to those persons and those families.

Daniel Callahan has stated:

> "...abortion on request as a moral position suffers from a similar weakness (as the traditional Roman Catholic position). In particular, I have in mind the contention that a "woman's right" to chart her own procreative destiny is the only moral issue at stake in abortion decisions. But just as the "right to life" of the fetus is too narrow a basis in determing the morality of abortion, so, too, the "rights of the woman" is equally narrow. Both positions try to rest their case on one, and only one, putative right; or one and only one, putative value....(I have argued that) many rights and many values come into play in abortion decisions and that a moral logic which tries to decide the issue on the basis of only one right or one value is bound to over-simplify and thus obscure the full moral complexity of the problem." *

I do not envy your task. This is one of the most profound issues that our society and elected officials have ever faced. Thank you for soliciting my response and every good wish in your work. Please call on me for any help I can give.

Yours Sincerely,

Dr. Kenneth Vaux
Associate Professor of Ethics in Medicine

* Daniel Callahan, ABORTION: Law, Choice and Morality, London: The MacMillan Company, 1970, P.448.

KV/SM

AND HUMAN SERVICES
DEPARTMENT OF HEALTH, ~~EDUCATION, AND WELFARE~~

HEALTH SERVICES ADMINISTRATION

Phoenix Area Indian Health Service
1440 East Indian School Road
Phoenix, Arizona 85014

1981 JUN -8 PM 10:

June 2, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

I reviewed your letter of May 13 which was forwarded to me in Phoenix from the University of Kansas School of Medicine.

At present I am working for the Indian Health Service, PHS, Phoenix Area.

From my experience in private practice and medical education, I have real concern about the impact of Senate Bill 158 and feel it will put us back 30 years medically speaking.

First, to answer your questions:

1. I do not believe the question of human personhood is a medical or scientific question. Question: Is an anencephalic monster a human being or not?

2. I believe this question is a religious, philosophical question and cannot be answered scientifically.

3. No - scientific data cannot answer metaphysical questions.

4. The most important issue is that abortions have been performed throughout the history of Mankind. One of the great tragedies even of the last 20 years, has been the occurrence of deaths and complications resulting in permanent damage to women from septic abortions. During my years in practice, I have seen many women die or survive crippled, sterile as a result of abortions done by unqualified persons in non-sterile circumstances.

Senator Max Baucus
Page Two

If this bill is passed, the poor women of this country will be forced to go to non-medically trained persons for cheap, dirty abortions that will return us to an era that those of us old enough to remember find a horrifying thought. The dark days of the abortion mills and their tragic results are not far away as past history reminds us, if we care to listen.

I hope this tragedy is not lived again, irregardless of the issue of when personhood or human life exists.

Thank you for requesting my opinion of this bill.

Sincerely,

Richard A Walsh MD

Richard A. Walsh, M.D.
Director, Office of Program
Development and Support
Deputy Chief Medical Officer

Yale University New Haven, Connecticut 06510

SCHOOL OF MEDICINE
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Department of Pediatrics
JOSEPH B. WARSHAW, M.D.
Professor of Pediatrics and
Obstetrics and Gynecology
Telephone 436-3193

May 5, 1981

Senator Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

At its recent annual meeting in San Francisco, the Council of the Society for Pediatric Research voiced unanimous disagreement with S.158, in particular the statement that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception". The Society for Pediatric Research, of which I am President, is the major organization in the United States concerned with research to improve the well being of children. Its active and emeritus membership consists of over 1100 pediatricians and other scientists concerned with improving the quality of life of children through basic, clinical and social research.

While the Society undoubtedly represents divergent views concerning abortion, our Council cannot accept the statement that there is current medical and scientific data that would support the principal assertion of this bill, that actual human life exists from conception. Those of us who deal with life and death in the practice of medicine daily feel that our medical and scientific expertise does not provide us with the wisdom to answer the question, when does life begin? We do not feel that scientists and physicians, or for that matter any group, has the knowledge to answer this question for everyone. In our pluralistic society, this must remain a question of conscience based on one's own moral, ethical or religious judgment and not be mandated or dogmatically supported by what the Council of our Society considers to be inappropriate and false scientific assertions. We feel strongly that this bill should be defeated not only because it is based on what we consider to be a false premise but also because of the fear, anguish, and torment that the provisions of this punitive bill will add to those families already faced with difficult decisions.

As pediatricians, we celebrate life. We cry with families when the life of a child is lost and suffer with families through the agony of illness. However, our special expertise in the science of development and in the clinical care of children does not provide us with a better foundation to discuss these issues than any other thinking or caring individual in our society. We cannot answer the question, "When does actual human life begin?" The answer rests in our conscience and not in a repressive bill based on so called "scientific evidence" which no experiment can ever verify.

Sincerely,

Joseph B. Warshaw

Joseph B. Warshaw, M.D.

JBW:jsm

Yale University *New Haven, Connecticut 06510*

SCHOOL OF MEDICINE
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April 24, 1981

Senator Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Thank you for giving me the opportunity to comment on S.158. Let me first provide a brief capsule of my own interests and responsibilities. I am Professor of Pediatrics and Obstetrics and Gynecology at Yale Medical School with responsibilities for directing the Newborn Intensive Care Unit at Yale New Haven Medical Center. This Unit is responsible for the care of extremely sick infants with problems ranging from very low birth weight, congenital malformations, and other disorders of early development. My research interests are in the area of developmental biology and biochemistry.

I cannot agree in any way that there is current medical and scientific data that would support the assertion that an actual human being or legal person begins at conception and that a fertilized ovum is "alive" any more than is a sperm or egg or for that matter any human tissue. "Life" is a continuim which the strategy of reproduction has moved through our evolutionary history. This is as close as medical and scientific expertise can approach this question. I agree with the statement that the question of human personhood is a moral, ethical, philosophical, religious and even a political question and that scientific and medical data should not alone attempt to provide an absolute definition.

I do not feel that my medical and scientific expertise puts me in a better position to discuss these issues than any other thinking and caring individual in our society. My own feeling is that concern for qualities of humanness is much more important than arbitrary definitions of life. It is far more important to be concerned about how individuals brought into this world as a result of conscious reproductive decisions can express their potential most fully. There are no universal standards to apply to questions concerning definition of "personhood" and no single group has sufficient wisdom to provide answers for everyone. These issues and decisions should remain the personal province of individuals in our society and should not be mandated by laws which can be punitive and dangerous.

Those supporting this bill seem in many instances to be far more concerned with the idea of "life" than with the quality of life. While they staunchly advocate the rights of fertilized eggs, they restrict or fail to support programs and public policies that will benefit infants and children at great social and nutritional risks. They cry less government, less interference, less intrusion on personal rights and liberty and then try to legislate morality in this most personal area concerned with one's own reproductive behavior. What irony!

As a concerned private citizen, I hope that this bill will be defeated and that the selfrighteousness and dogmatism of a particular group of individuals who feel that they have the only license for moral behavior in our society will not prevail over essential personal rights and freedom to control reproduction.

Thank you for giving me this opportunity to respond. With very best regards.

Sincerely,

Joseph Warshaw

Joseph B. Warshaw, M.D.

JBW:jsm

MICHIGAN STATE UNIVERSITY

DEPARTMENT OF PEDIATRICS/HUMAN DEVELOPMENT
B240 LIFE SCIENCES

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July 8, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I realize that is has been quite some time since you wrote me regarding Senate Bill 158, and asked a number of questions regarding that purpose legislation. In answer to your questions, however, I believe that human personhood is not a medical or scientific question and can be considered one that is part moral, ethical, philosophical, religious or political. I do not believe that medical or scientific data can determine a definition of personhood and further that the impact of S 158 on the practice of medicine would represent an unnecessary interference with ethical, personal medical services. Furthermore, I consider this bill an unwarranted attempt of the Congress to practice medicine without a license.

We have had a great deal of difficulty in this country with our attempt to define death. Finally we have some state legislation which indicates that fundamentally death is said to exist when the vital functions of breathing and circulation can not be sustained independently and without extreme technological interference. One might consider the possibility of defining life then, as the reverse of this: that is, life can be said to exist when an organism is able to independently sustain respiration and circulation without extraordinary technological support. That would be consistent with the definitions of death that have become accepted law and probably this is as close as we are going to come in the near future.

Again I apology for the tardiness of this reply and I hope it still may be useful.

Sincerely yours,

William B. Weil, Jr., M.D.
Professor
Department of Pediatrics/Human Development

WBW:s

THE
GEORGE
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MEDICAL CENTER

*Department of Obstetrics
and Gynecology
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The H. B. Burns Memorial Building / 2150 Pennsylvania Avenue, N.W. / Washington, D.C. 20037

1981 APR 24 PM 12: 03

April 21, 1981

Senator Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

I have followed the issue involved in S.158 with great interest. You have asked some important and perceptive questions of me as a medical and scientific expert. Yet, expertise in these areas does not allow me to respond with certainty. In the clinical sense, life begins when viability is attained. That is, when a developing fetus is capable of survival independent of the mother. That age, as you know, has steadily moved earlier and earlier through pregnancy.

To say that life begins with conception may seem logical in a biologic sense but has no meaning to me in terms of medical management nor in terms of the issue of personhood. It must be recognized that certain mammalian ova are capable of developing, at least to some degree, in the absence of fertilization (unconceived). Obviously, we must also consider the "life" and "personhood" of the fertilizing agents themselves. Does not the sperm swim and attach itself to and eventually penetrate the egg membrane? Does it not contain life substances which will govern the makeup of the newly-conceived child? Must we, therefore, ban the use of all barrier contraception as being destructive of life of that particular structure?

From my perspective, as a specialist in human reproduction, I am unable to answer your questions. I wonder how a group of elected legislative officials feels competence in addressing the same questions and, more importantly, in passing laws that will impact on the lives of millions of our citizens? I am sorry that I cannot be more specific in my response, but your questions are difficult, indeed.

Sincerely yours,

Allan B. Weingold, M.D.
Professor and Chairman

ABW:me

AMERICAN ASSOCIATION FOR CANCER RESEARCH

SIDNEY WEINHOUSE, PH.D.
President

MAY -8 AM 9:45

May 5, 1981

The Honorable Max Baucus
U.S. Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Baucus:

At the suggestion of Ed Adelberg of Yale University, a member of the National Academy of Sciences, I am sending you the following resolution to inform you of the attitudes of a large body of cancer researchers familiar with human biology concerning the hearings now underway under the chairmanship of Senator John P. East.

The American Association for Cancer Research is an organization of approximately three thousand scientists and clinicians who conduct laboratory and clinical investigation on cancer in this country. At its 72nd annual meeting held in Washington last week, the Association, responding to concerns voiced by several members, passed the attached resolution. After the resolution was read, and after free and open discussion, the resolution was approved by a large majority of the members attending the meeting. In this resolution we are expressing the concern of most scientists trained in human biology that a Congressional committee is making a scientific issue out of one that is entirely moral or religious.

Please be assured that I and many of my colleagues are ready to be of any assistance we can in expressing the viewpoints of the well informed biomedical scientist.

With best wishes,

Sincerely,

Sidney Weinhouse

Sidney Weinhouse, Ph.D.

SW:daw

Enclosure

A RESOLUTION ADOPTED BY A MAJORITY OF MEMBERS ATTENDING THE 72nd ANNUAL BUSINESS MEETING OF THE AMERICAN ASSOCIATION FOR CANCER RESEARCH, TUESDAY, APRIL 28, 1981

It is the view of the American Association for Cancer Research that the statement in Chapter 101, Section 1, of U.S. Senate Bill S 158, 1981, cannot stand up to the scrutiny of science. This section reads "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." The bill further proposes that the term "person" shall include "all human life." These statements purport to derive their conclusions from science, but they deal with questions to which science can provide no answer.

Defining the time at which the developing embryo becomes a "person" must remain a matter of individual moral or religious values.

The Association reaffirms support for the concept of utmost protection for human life, but recognizes major religious and ethical differences on the characterization of the onset of personhood.

The membership expresses its concern that the Congress is attempting to define by legislation what constitutes science and what does not.

THE UNIVERSITY OF ARIZONA
HEALTH SCIENCES CENTER
TUCSON, ARIZONA 85724

COLLEGE OF MEDICINE
OBSTETRICS & GYNECOLOGY

1981 APR 30 AM 11: 54

April 27, 1981

Mr. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Mr. Baucus:

Professor C.D. Christian, Chairman of the Department of Obstetrics and Gynecology at the University of Arizona has given me your letter requesting information on Senate Bill S. 158. The questions you asked are very difficult to answer but I will try to be brief yet concise. Much has been written about the definition of human personhood and it appears that this is a philosophical discussion more than a medical or scientific one. It appears that the philosophers have difficulty defining what constitutes personhood and certainly it would be foolish for a physician or scientist to try to improve on that. This idea incorporates the answer to question #2 which is that human personhood is certainly a philosophical and religious question and not a political one. Morality and ethics enter into the discussion of personhood, but certainly do not constitute a definition. As to the third question, medical and scientific data alone will never be able to assess what constitutes human personhood as this is a question that will never come from the laboratory.

Many attempts have been made by the philosophers to indicate what constitutes personhood and I have enclosed an article for you which gives one prominent philosopher's approach.

I am sure you are aware of other ramifications if this bill passes which include the discussion that has ensued on contraceptive agents, and also the whole field of genetic diagnosis, especially that related to prenatal genetic diagnosis, would be terribly altered by passage of this bill. We are continuing to make incredible strides in the field of prenatal genetic diagnosis and it would be a shame if we would be stopped because of a law such as this.

I do hope this information is of use to you. If I can be of any further help at any time, please let me know and I will do what I can for you.

Sincerely,

Louis Weinstein

Louis Weinstein, M.D.
Assistant Professor
Division of Perinatal Medicine
Associate Director, Prenatal
Genetics Unit

LW/ls

cc: C.D. Christian, M.D.

RUTGERS
THE STATE UNIVERSITY
OF NEW JERSEY

1981 JUN -1 AM 10:51

NEWARK COLLEGE OF ARTS AND SCIENCES • NEWARK • NEW JERSEY 07102

Senator Max Baucus
U.S. Senate
Washington, D.C.

Dear Sen. Baucus,

As an embryologist, I am writing to oppose S 158 which would prohibit abortion. It is not a scientific fact, but a statement of some religions that a "person" exists from the moment of fertilization. This bill is an invasion of privacy and should not be released from the subcommittee.

Sincerely,
Judith S. Weis, Ph.D.
Dept. of Zoology

UNIVERSITY of SOUTH ALABAMA

COLLEGE OF MEDICINE
DEPARTMENT OF MEDICAL GENETICS

2451 FILLINGIM STREET
MOBILE, ALABAMA 36617
TEL. 205/473-6311 EXT. 478

June 4, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter. You said you were writing to me "as a medical expert". I am replying as a private citizen, speaking for myself and not the College of Medicine of the University of South Alabama, and hoping to provide some answers to your questions. I will be brief and therefore will be glad to clarify some of my statements if you so desire later.

First, concerning the bill itself, Section 1: "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." The phrase "present day scientific evidence" is objectionable to me. I do not believe that "present day scientific evidence" motivated the proposed legislation. Multiple historical examples in the United States and other countries (Prohibition, discriminatory immigration laws) have shown that poor legislative decisions frequently have been based on simple social biases although they invoked "present day scientific evidence". Secondly, "present day scientific evidence" is not immutable nor omniscient, as demonstrated in very recent years by diametrically conflicting testimonies of science concerning the effects of sugar substitutes, vitamins, etc., etc. "Present day scientific evidence" can be whimsical; what is scientific gospel today may be scientific nonsense tomorrow. Our knowledge is finite and changing.

Concerning the language, "'person' shall include all human life as defined herein", is sweeping language that even many religions have hesitated to use concerning human life beginning at the moment of conception. "Life", "human life", and a "person" are three separate and difficult questions which in the bill are merged into one.

Concerning your questions:

(1) I do not believe that the issue of human personhood can be addressed by the current medical and scientific methods. This question concerns qualitative judgements about life. Science should not be expected to pass judgements on "quality of life" unless we wish to repeat historical monstrosities.

(2) The question of human personhood is indeed a moral, ethical, philosophical, religious, and political question. The political process is

most effective when it can crystallize or preserve concepts perceived as just and already espoused within a pluralistic society. I doubt that this bill represents a majority view. Social views about such delicate matters, bordering on the intimate, cannot be ascertained by an open debate, frequently of bitter nature. A national referendum and secret vote, although unlikely, is desirable. I believe that the recent referendum of Italy points out current social perceptions about the issue of abortion (Italians voted for legal abortions).

(3) I do not believe that medical or scientific data alone can at this time effectively enhance our legal definition of human personhood.

(4) The impact of S.158 will be significant and I believe detrimental. What are we to do with the women who do not wish to be mothers? Is a mother who is careless during her first few months of pregnancy (refuses to follow doctor's orders) to be considered as violating rights of her fetus? We have laws against child neglect. Are we to regulate pregnancy neglect? Is a diabetic mother culpable if she becomes pregnant since maternal diabetes can result in birth defects? Is the I.U.D. to be banned by law? Is a user of an I.U.D. committing a "probable" crime since conception occurs in the tubes and the device operates in the uterus and the woman does not know if she conceived? To carry the point further, is a user of an I.U.D. who has no opportunity for sexual intercourse to be considered innocent? What medications and devices should be banned to protect embryonic personhood?

Basically, I do not believe abortions will cease because of a given law. The difference will be as to "by who", "for whom" and "how" abortions are to continue. While an abortion indeed kills fetuses, incompetently performed abortions can destroy a fetus plus an adult. Abortions can be restricted selectively by social and professional regulations. Unfortunately, Bill S.158 appears to be the political crystallization of an emotional issue without the intent of positively moderating current concerns about abortion.

Sincerely,

W Wertelecki

Wladimir Wertelecki, M.D.
Professor and Chairman

WW/ds

**SCHOOL OF
MEDICINE IN NEW ORLEANS**
Louisiana State University
Medical Center
1542 Tulane Avenue
New Orleans, LA 70112

Department of Obstetrics and Gynecology

June 1, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Your letter of May 13, 1981 to Dr. Abe Mickal was given to me by Dr. Mickal inasmuch as I succeeded him as Head of this Department last September.

I am pleased to respond as you requested. The question of human personhood is entirely an ethical, philosophical and religious one, and is not within the domain of medicine and science. I do not feel that most (if any) medical personnel can answer the question of when life truly begins. Therefore, I do not believe that medical and/or scientific data alone can determine this definition. I wish that such an issue was not legislated upon nor become an issue before the U.S. Houses of Congress.

As an Obstetrician and Gynecologist, I have great concern about Bill 158 and its effects on prohibition, limitation or regulation of performance of abortions in the United States. To me, this would be a giant leap backward to the days of the ability of the affluent to obtain safe terminations of pregnancies and the indigent to become prey once again to the illegal underground abortionist. Whether we like it or not, there will be a continued percentage of our population who will seek an abortion, one way or another. It is very rare for us these days to see a badly infected post abortion patient; I can envision a return to the days prior to the late 1960's when they were more or less commonplace. Inevitably also, S. 158 will have an adverse effect on mid-trimester screening for possible genetic abnormalities. Having been personally involved with this procedure for over 15 years, I can assure you that women who have had a previous child afflicted with Down's syndrome, a neural tube defect, one of the hereditary biochemical or histochemical defect disorders, etc., will suffer inordinately and unnecessarily through an additional pregnancy(ies) if S. 158 is enacted.

I hope that this information will be of assistance to you, Senator Baucus, and will be pleased to respond further if I can be of further assistance to you.

Sincerely,
Charles A. White M.D
Charles A. White, M.D.
Professor and Head

CAW/ab

THE UNIVERSITY OF NEW MEXICO ☐ ALBUQUERQUE, NEW MEXICO 87131
SCHOOL OF MEDICINE ☐ DEPARTMENT OF BIOCHEMISTRY ☐ 915 STANFORD DRIVE, NE ☐ 505 277-3333

June 5, 1981

U.S. Sen. Max Baucus
Room 5327
Dirksen Office Bldg. (NSOB)
Washington, D.C.

Dear Sen. Baucus:

I wrote the enclosed letter, outlining my views of Senate Bill 158, intending it to be included as part of Dr. Napolitano's response to your recent request. He has asked me to send it to you directly, and also to send it to our state's senators.

I am a member of the Department of Biochemistry in The University of New Mexico School of Medicine. My research is primarily focused in two areas. I am interested in the chemistry of brain processes, especially those involved in mental retardation, learning and memory. I am also, in collaboration with Dr. K.S.K. Tung of this medical school, working on the molecular mechanisms of fertilization. We are trying to identify the molecules by which sperms and eggs recognize each other. I also am interested in, and participate in, my University's Philosophy Department colloquia. The accompanying statement represents my own personal view, after thinking about the issue for several years.

I shall feel honored if this statement can be useful in any way.

Sincerely,

Gaynor C. Wild, Ph.D.
Assistant Professor

GCW/ldc

Enc.

UNM
THE UNIVERSITY OF NEW MEXICO
SCHOOL OF MEDICINE
ALBUQUERQUE, NEW MEXICO 87131

June 1, 1981

L.M. Napolitano, Dir. Medical Center &
Dean, School of Medicine
University of New Mexico
915 Stanford Drive N.E.
Albuquerque, New Mexico 87131

Re: Abortion and the Definition of the Beginning of Human Life

Dear Dr. Napolitano:

I. Life and Human Life:

From a biological point of view, the presence of life is not an issue in the abortion controversy. However one defines life, all cells have it from the time the cell is formed until it starts to lose its integrity as a cell. Both spermatozoa and eggs are alive before conception. The question in abortion is individual human life, and when it begins.

Different biologists mark different events as being the instant of "conception". A human egg has several layers a sperm must penetrate to join with the egg. After the sperm has penetrated the last membrane barrier to its journey, the sperm DNA and egg DNA combine, forming genetic aggregate which may become the genome of a new individual, after a great deal of further development and change.

The concept that a particular DNA pattern can determine most, but not all of the characteristics of a human being is based on biochemical experiments done in the late 1940's (1). This concept is not seriously challenged today. But marking the formation of a particular DNA pattern as being the precise moment of the beginning of human life is not a biological concept, but a theological one. If a person believes a soul enters the egg, along with a sperm's DNA, then biological data is irrelevant. The remainder of this discussion deals only with biology.

After the new DNA pattern has formed, a series of pre-programmed changes begin, which, of course, do not end until the organism dies. The statement that a new biological pattern exists immediately after DNA fusion is true, but trivial. The biological pattern of the fertilized egg continuously changes. The changes come more slowly as the organism ages, but the changes continue nonetheless. This is true whether the pattern is followed immunologically, morphologically, physiologically or biochemically: the new pattern formed after DNA fusion is transient. All of the above mentioned patterns finally stabilize with time, achieving greatest stability after puberty.

DEPARTMENT OF BIOCHEMISTRY, NORTH CAMPUS TELEPHONE 505: 277-3333

But what part of these patterns is most important to giving the quality of humanity to a living organism?

II. Cerebral Death and its Implications:

Turning our attention to the end of life, a trend with important implications concerning the nature of human life has recently appeared in law. The concept of cerebral death has been agreed upon by an astonishingly wide range of people, from lawyers to scientists and physicians, including even some religious spokesmen. The underlying idea in cerebral death is that human life is absent when the most significant brain functions, as measured by physiological and/or chemical criteria, are irreversibly absent. Stated another way, the rest of a person's entire body can be healthy, but if the brain is completely and irreversibly non-functional, then the person is dead. Under the criteria used, there must be convincing evidence that there is no possibility of restoration of brain function. The major criteria are the absence of drugs that affect the brain, and the total absence of electroencephalographic (EEG) or "brain wave" activity for a prolonged time (2).

The obvious philosophical implication of this widely held concept is that our specific, individual "humanity" lies in our brain function, not in the maintenance of life in other parts of the body.

III. Brain Function and/or Consciousness in Fetal Life:

If the essence of our humanity lies in brain function, and if we can detect the presence of this function by EEG and certain chemical criteria, then we can apply these measurements to the human fetus. Quite a lot of published work addresses this question (3,4), and a general conclusion is that premature infants of a particular age after conception have the same degree of brain maturation as a fetus of the same age in utero. In general, there is no sign of significant EEG activity before 24 weeks post-conception. The earliest documented "brain wave" activity in a fetus that I have found was in a 19-week old premature. The kind of EEG activity found was very weak and remarkably abnormal. There is no reason to believe that any brain function is measurable during the first trimester (13 weeks) or shortly thereafter. 24 Weeks is usually taken as the beginning of EEG activity in the fetus (4).

At the other end of gestation, there is no question that major brain activity, as measured by the EEG, is present during the third trimester of pregnancy. 32-Week old fetuses have extensive, although immature EEG patterns (4).

IV. Conclusions:

Based only on the above-discussed biological principles, one can conclude:

1. The essential difference between life and specifically human life lies in brain function.
2. That brain function which is central to human life can be detected by EEG (physiological) and certain chemical criteria.

3. That human life does not begin in the fetus until the second trimester, specifically at or about the 18th or 19th week, in conservative estimate.

4. That human life does definitely reside in the fetus during the third trimester.

V. "Potential"Human Life as Opposed to Actual Human Life:

One can, and many people do, argue that potential human life should be protected as well as any actual human now existing. Leaving aside the arguments about the (theoretically) possible cloning of an individual from any living cell (even many cancer cells), there is still a serious problem with this. Fertilization is not a perfect process. Under certain conditions, even sperms and eggs of different species can fuse. Even in the ordinary course of events, a human egg may be fertilized by more than one sperm or by a defective sperm. No one knows how frequently these abnormal events occur, but some (5) have speculated that they may account for a majority of all fertilizations. Most of these are sloughed off by the woman's body, often without her knowing that anything has occurred. They simply wash out in the menstrual flow. Penrose (5) has collected a large series of these early spontaneous abortions, and showed that their genetic component is often incapable of supporting human life. Some of these conceptuses have as many as three or four times as many chromosomes as normal, yet the conceptus is "alive" for days to weeks after fertilization. A law which declared each of these a person would be a biological and philosophical absurdity.

VI. I totally oppose Senate Bill 158. The statement that present day scientific evidence indicates human life to begin at conception is clearly false. Many scientists would agree with the statement, but because of their religious or philosophical beliefs, not scientific evidence.

The problem that most fertilizations may be monstrous if they survived, and cannot be accounted for, seems to me to make the proposed law as unworkable as a law about digestion. These are common, and incompletely known biological processes.

The advent of personhood is, for many people, scientists and laymen alike, decided by the time at which a soul enters the conceptus. This is clearly a religious matter, upon which people of good will will disagree, and it clearly does not belong in law.

As for me, and many philosophically in agreement with me, human life can in theory be measured biologically, using the thinking outlined above. However, these techniques and the data they have yielded are relatively new. We are certain to know more in the future. As for now, the Supreme Court decision in Roe v. Wade so clearly coincides with these neurobiological principles, that I believe we can do no better at present.

Sincerely,

Gaynor C. Wild, Ph.D.
Assistant Professor

GCW:mas

REFERENCES

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OFFICE OF THE DEAN

SCHOOL OF MEDICINE
DAVIS, CALIFORNIA 95616

June 1, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washinton, D.C. 20510

Dear Senator Baucus:

Your letter of May 13 to Morton Levitt has been referred to me as Dr. Levitt died a year ago, and I am currently Dean of the School of Medicine at the University of California at Davis. I appreciate your giving me the opportunity to respond to this proposed legislation S 158.

The question of determination of human personhood is obviously a difficult and complicated problem. It is partly a medical and scientific question and partly one which has a great deal of moral, ethical, philosophical, religious, and political overtones. My own opinion is that it is difficult to determine the definition of human personhood on medical and scientific data alone. However, I do feel that scientific data to date do not support the conclusion that human life exists from the moment of conception. An example might be appropriate; a small excised piece of human skin contains all of the DNA and chromosomes found in a fertilized human ovum, yet we do not consider that piece of skin a person. Differentiation of the fertilized ovum into an organism which has the functional attributes of a human fetus is what differentiates a person from human material which contains the genetic material of that individual. Obviously, the decision as to when a mass of cells becomes an actual human fetus involves a number of considerations, not the least of which are the philosophical and political ones.

The potential impact of S 158 is frightening. It will have some very immediate obvious results. It will certainly increase the use of potentially dangerous contraceptives. It will drive unwed mothers into the hands of criminal abortionists, leading to the unnecessary loss of human life. It will increase the number of retarded children, children with Down's Syndrome, and children with severe dibilitating birth defects. It will nearly eliminate genetic screening and impair our development of new research programs designed to prevent genetic diseases. In short, I believe this bill will have a devastating effect on this country's health care system. I sincerely and earnestly hope that this bill will be defeated in your subcommittee.

Sincerely,

Hibbard E. Williams, M.D.
Dean

HEW/bjk

THE UNIVERSITY OF MICHIGAN
MEDICAL SCHOOL
ANN ARBOR, MICHIGAN 48109

DEPARTMENT OF OBSTETRICS & GYNECOLOGY

1981 MAY 4 AM 8:48

April 28, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Mr. Baucus:

The union of sperm and ovum obviously is the beginning of the evolution of a human being. I have no way of judging when an embryo becomes a person.

For many years I have been a proponent of abortion and I shall continue to defend the right of a women to terminate any pregnancy which is intolerable from either medical or social point of view.

Very truly yours,

J Robert Willson

J. Robert Willson, M.D.
Professor

JRW/lrm

CHILDREN'S HOSPITAL MEDICAL CENTER

The Children's Hospital Research Foundation
Elland & Bethesda Ave
Cincinnati Ohio 45229

Department of Pediatrics
College of Medicine
University of Cincinnati

1981 APR 27 PM 12:13

April 23, 1981

The Honorable Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In reply to your letter of April 16 containing three questions relating to the upcoming hearings on S.158, I am pleased to submit the following comments.

I believe that human personhood is not a medical or scientific question.

I believe that human personhood is based on philosophical and logical concepts which have undeniable ethical implications and which can in part be defined in scientific terms.

I agree that medical and scientific data alone cannot determine what the definition of human personhood should be.

May I elaborate my views briefly as follows. I believe that the condition or state of human personhood begins in fact when an individual begins to exhibit uniquely human traits, in distinction from the behavioral and mental traits which characterize other animals. The traits which are distinctively human usually begin to appear a few weeks or months after birth in the form of emotional and communicational exchanges with the mother and usually continue to increase throughout infancy and childhood. Some unfortunate individuals with profound mental deficits, however, never achieve these and the other logical and judgmental traits which characterize human beings. Strictly speaking such individuals do not attain human status; but another human trait, compassion, has caused society to accord them legal status as human beings.

Before these traits appear, and particularly before birth, the fetus and the embryo of the human species have human potentiality but this is not manifested in any overt way, therefore, human personhood does not exist. The embryo and fetus of man do not show any physiological activities not also displayed by similar developmental stages of other animals. As existence in utero progresses, the fetus of man shows physical or anatomical differences from other species; but fetuses

The Honorable Senator Max Baucus
page 2
April 23, 1981

of all species begin to show their particular physical characteristics; and the magnitude of these differences is no greater, in fact may be less, between man and monkey than between monkey and mouse, for example.

The potentiality to become human begins at conception when the hereditary potential of all species is established by union of the germinal cells of the parents. The actuality of being human, however, is not manifested until after birth, and then not always to the same degree. No one questions that a newborn infant is human, despite the knowledge that an unfortunate few may never express characteristic human traits of behavior and mentality and may remain in a state crudely referred to as "vegetable".

I believe this is sufficient to give you an impression of my views relative to the issues in S.158. Please call on me if I can be of further service.

Sincerely yours,

James G. Wilson jmh

James G. Wilson, Ph.D.
Professor Emeritus of
Research Pediatrics

jmh

THE UNIVERSITY OF ROCHESTER
MEDICAL CENTER
SCHOOL OF MEDICINE AND DENTISTRY · SCHOOL OF NURSING
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Frank E. Young, M.D., Ph.D.
Dean of School of Medicine and Dentistry
Director of Medical Center
(716) 275-3407

July 2, 1981

The Honorable Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I apologize for not answering your letter of May 13, 1981 sooner. Your communication reached my office on May 26, 1981, a time which coincided with our graduation, the completion of our promotions of medical and graduate students, and the finalization of our budget process. Because your letter raised such important issues, I deferred it until I was able to concentrate on your questions.

In responding to your questions and S. 158, I shall comment from the medical, philosophical, religious, and ethical viewpoints. Wherever possible, I will clearly distinguish between these views.

The seminal issue in the bill is "human life". There appears to be an emphasis on life versus human life in this legislation. This is a difficult question, particularly since a significant number of fertilized eggs undergo spontaneous abortion during the first trimester. Thus, some have argued that the twelve-week point, a time where the fetus is fully differentiated, can be used to distinguish when "human life" occurs. These individuals argue that up until the time of full differentiation human life does not exist. Others have used the average time when a fetus can survive outside of the uterus as the boundary of human life. Both definitions cause considerable theoretical problems, however. First, a mammalian egg, once fertilized, if left uninterrupted has a high probability of differentiating into a human being. Second, since science could some day develop to the point where a fertilized egg could be raised to a mature infant in the absence of the maternal uterus, the boundary becomes difficult. Finally, it must be remembered that eggs can be fertilized in a test tube and reimplanted into the uterus. Thus, you must be prepared to ask: Is the fertilized human egg alive and human? This is the crux of the issue.

I shall attempt to reply to your questions from a medical standpoint as a geneticist, molecular biologist, and physician. My research in recombinant DNA will probably influence this response.

1) Do you believe that the question of human personhood is a medical and scientific question? I do not believe that either medicine or science can be the sole judge of human personhood. If it were solely

a medical or scientific question, would you need a bill? The fertilized egg clearly has the potential to differentiate into an infant that can exist as an independent biologic entity. Following implantation in the lining of the uterus, these events of differentiation proceed rapidly until all of the organs are formed (at about twelve weeks). I do not know of any discrete point where one can unequivocably state that life changes into human life unless one selects the completion of most of the differentiation processes. Therefore, such decisions, in large measure, are arbitrary and political rather than medical. Some differentiation events occur even after the nine-month period of gestation.

2) Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? Since, in my opinion, science and medicine cannot unequivocably establish the time in the continuum of development where human life begins, the decision is in part moral, ethical, philosophical and religious. Ultimately, it will be expressed in political terms.

3) Do you believe that medical and scientific data alone can determine what the definition of human personhood should be in the present context? No, science is a method to approximate truth by experimentation. Medicine is both an art and a science that endeavors to prevent and treat the maladies afflicting mankind to increase the quality of life. Such data cannot be used in the absence of human interpretation to answer such complex human issues.

4) What, in your judgment, would be the impact if S. 158 is enacted? This is a difficult question. I would conclude that if 158 is enacted the rate of hospital abortions would decrease, covert abortion clinics would again increase accompanied by the complications of infection, maternal death and increased psychological trauma. Increased efforts would be directed towards contraception with emphasis on prevention of pregnancies through chemical means. Unless contraception can be appropriately used in society, we may be faced with poor environmental conditions for the nurturing of offspring.

The problem of teenage pregnancies is particularly critical. The child born to a thirteen- to fifteen-year-old mother has a much greater chance of complications than a child born to a more mature woman. In addition, the mothering habits and patterns of such young mothers are often deficient. Thus, I would predict more teenage pregnancies and substantial societal complications.

A major debate would also occur regarding the appropriate use of abortions. If a mother's life is threatened, should one abort or save the infant? Should an abortion be recommended if the fetus has fatal congenital abnormalities which would terminate life early in infancy? The effect of genetic screening would be influenced by the answer to the latter question. If the answer is yes, we would continue to have to have vigorous genetic programs. One can identify with the tragedy of a family when the newborn infant has a fatal disease and one can only watch and wait while the infant slowly succumbs.

A major question will also arise concerning artifically fertilized eggs. Is each one alive? (For instance, if a woman with sterility due to obstruction of the Fallopian tubes has eggs removed from her ovaries and fertilized by her husband's sperm in a test tube and one of five was selected for implantation, would the other four be considered murdered? These complications stemming from in vitro fertilization will be even more difficult than the questions of abortion which you are examining today.

From an ethical, moral, philosophical and religious view, the questions are equally as complex. If God is all-knowing, all-loving, all-righteous and all-holy, should man ever intervene in nature? Yet, in the first chapter of Genesis man is commanded to have dominion over the earth. The issue is where and under what conditions does man intervene in nature. Ethically, one must balance the life of a malformed infant against the anguish of the family. In the gray zones this is even harder. Our oldest daughter is retarded, yet she is a delightful productive person who works forty hours per week in a hospital cafeteria. Certainly, she is a contributing human being.

The use of abortions as another type of contraception, in my opinion, is immoral and potentially could infringe upon the rights of the unborn child. It has been argued by some that the child is part of a woman's body and, therefore, the woman must decide. Biologically, this is incorrect, in my opinion. The newborn, genetically, is a different being and is best viewed as a passenger nurtured by the woman for nine months. In the final analysis, these questions will be resolved politically and, regretfully, arbitrarily. Because there is no time at which life can be termed as beginning-to-be-human, on the basis of science or medicine, it will be a political judgment.

I have deliberately avoided introducing my own religious convictions. However, since they may influence my recommendation, it is only fair that I state my beliefs briefly. Since I am convinced that there is a sovereign God who controls the universe, I must acknowledge the dignity and purpose of life. I emphasize that the definition of life cannot be merely made on "technicratic" bases. It must be based on the theological and philosophical view of man's purpose and reason for existence.

I hope these thoughts will be of help to you. If there are any further thoughts which I can provide during your deliberations, I would be happy to do so.

Sincerely,

Frank E. Young -jm

FEY:eb

Signed in Dr. Young's absence

OSU

The Ohio State University

Department of Obstetrics
and Gynecology
N645 University Hospital
410 West 10th Avenue
Columbus, Ohio 43210
Phone 614 421-8697

1981 MAY -1 AM 9:52

April 23, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for permitting me to respond concerning the hearings on S.158 which concerns the question of human personhood as to whether it is a medical and scientific question. The question of human personhood and whether it is a medical and scientific question is a most difficult one to answer and may be truly impossible to achieve, but the following pertains to what is known on a medical-scientific basis.

The problem of personhood begins with whether a fetus can survive in the world when it is born, either surgically or by natural causes. It is generally known that the ability of a fetus to survive depends upon the degree of differentiation of the lung, and this is not complete enough nor is there a chance of survival until at least 26 weeks of gestation. At this point in time, there are no mechanisms by which we can lend support for a fetus that is less than 26 weeks gestational age for any hope whatsoever of survival. The majority of organs are developed by 10-12 weeks of gestation, but the central nervous system continues to mature throughout pregnancy. The differentiation after 12 weeks of pregnancy has the fine tuning that is necessary for the ultimate development in the baby. The philosophical, ethical, and religious issue deals with when is the soul inserted into the body of the fetus and is the soul present before the fetus has a chance of surviving?

Most individuals do not have difficulty coping with the fact that in the first 12-14 weeks of pregnancy, a pregnancy interruption can be done without too many issues to be faced. However, after 14 weeks of pregnancy, when a recognizable fetus is delivered, some individuals have difficulty handling this even though they know there is no chance for the baby to survive and hence, herein lies the dilemma.

It is indeed difficult for me to feel that a human personhood begins before the actual chance of survival of a baby once it is born, either by artificial survival means or by natural survival means. This would mean that human personhood begins after 26 weeks of gestation.

Respectfully submitted,

Frederick P. Zuspan, M.D.
Professor and Chairman

FPZ:sm

PART 4.--RESPONSES OF CONSTITUTIONAL SCHOLARS TO SENATOR BAUCUS' LETTER

United States Senate
WASHINGTON, D.C. 20510

May 13, 1981

SENATOR BAUCUS 216

CONSTITUTIONAL

Dear Professor

I am currently serving as the ranking minority member of the United States Senate Judiciary Committee Subcommittee on Separation of Powers. On April 23 and 24, the Subcommittee is beginning a series of hearings on S.158. This legislation is designed to define human personhood as beginning at conception. The purpose of the legislation is to overturn the effect of the Supreme Court decision in Roe v. Wade. I am enclosing a copy of the bill for your review.

I am writing to you in your capacity as a leading expert on American constitutional law. I am interested in your assessment of whether or not the Congress has the authority under the Constitution and particularly under Section 5 of the 14th Amendment to enact Section 1 of S.158. Does the Congress have the authority to define legal/constitutional personhood in the face of the Supreme Court decisions on abortion? For legal analysis by the sponsor of the bill, see Volume 127 Con. Rec. S.288-S.294 (Daily Ed. January 19, 1981).

The Subcommittee will be considering these matters in the near future and so a timely response would be most helpful.

I appreciate your assistance in this matter and look forward to hearing from you as soon as possible.

With best personal regards, I am

Sincerely,

Max Baucus

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers

GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, D.C. 20001

ARLES F. ABERNATHY
ASSOCIATE PROFESSOR OF LAW

April 28, 1981

The Honorable Max Baucus
United States Senate
Ranking Minority Member
Subcommittee on Separation of Powers
Senate Judiciary Committee
Washington, D.C. 20510

Re: S.158

Dear Senator Baucus:

I have received your letter asking my opinion of the constitutionality of S.158 which would overrule Roe v. Wade by extending the protection of the Fourteenth Amendment to potential life from the moment of conception.

Please find enclosed a short memorandum which sets forth my views.

If I can be of further assistance to you or the subcommittee, please let me know.

Yours truly,

Charles F. Abernathy

Charles F. Abernathy

CFA:cad

Enclosure

WRITTEN STATEMENT OF CHARLES F. ABERNATHY ON S. 158

I. FEDERALISM

The original text of the Constitution dealt largely with issues of federalism: it gave limited topical powers to the central government and left the remainder to the states. The Bill of Rights amendments created individual liberties which the federal government could not infringe. Most people think that the Fourteenth Amendment merely added a second set of individual liberties which _state_ governments could not infringe.

The Fourteenth Amendment, however, also had substantial implications for our system of federalism, for it added a new range of topics--primarily due process and equal protection-- to the list of federal concerns. Correspondingly, any topic found included within the Fourteenth Amendment will be subject to federal power and will permit no state or local variations.

By including abortion decisions within the Amendment, therefore, the Court's decision in _Roe_ v. _Wade_ had a significant impact on the balance of federalism. At the time of the _Roe_ decision several states had begun to experiment with new and reformed abortion legislation which to them appeared to represent a more reasonable accommodation of parental/individual and fetal/health interests than had earlier state statutes, which themselves had been products of earlier experiments and reforms. The Supreme Court in _Roe_ substituted its uniform, national Constitution-based rule for these pieces of state legislation.

Those who opposed *Roe* because they thought that it disregarded the principles of federalism must recognize that S. 158 perpetuates the mistake. It substitutes a set of national legislators' ideas for those of the national judiciary, but for federalism purposes it matters not what the national rule may be or which branch may announce it. In either case local and state decision-making is disregarded in favor of a uniform federal rule. If California or Illinois, for example, in light of local conditions and social problems their people deemed important, wished to enact an accommodation of personal interests different from that contained in S. 158, they would be forbidden to do so. Indeed, as I shall suggest below, states' rights would be even more narrowly circumscribed under S. 158 than they are under *Roe* v. *Wade*.

II. ACCOMMODATION; MINIMUM STANDARDS

Even if one blinds oneself to the concerns of federalism and demands a nationally uniform definition of life, S. 158 bears few of the graceful indicia of Constitution-based law. Such law usually reflects an accommodation of interests and rejects absolute commands in favor of more flexible decision-making. The First Amendment, despite its absolutist language, for example, has been interpreted to permit "time, place, and manner" restrictions on speech or even outright punishment of intentionally inciting speech. Even *Roe* v. *Wade*, for all its questionable qualities, issued no absolute fiat protecting abortions. It balanced and accommodated a range of interests and gave paramountcy to some in the early stages of pregnancy, to others at later stages. Constitutional law, in short, sets minimum standards for protecting certain identifiable rights or interests and leaves government considerable latitude in deciding what further safeguarding of interests is necessary.

S. 158 does not measure up to the accommodation principle. Its absolutist protection for "human life" from the moment of "conception" sets no minimum standard. It provides the only standard and permits no other interests to be accommodated. (A state could go beyond the minimum and provide protection for life interests inherent in human sperm or ova, but to note the argument seems to me to illustrate how little discretion would be left for state legislators should Congress enact S. 158.)

III. CONGRESSIONAL POWER TO ALTER THE CONSTITUTION

It is contended, however, that federalism and accommodation principles may be laid aside because Congress has power under Section 5 of the Fourteenth Amendment to adopt legislation going beyond the minimum safeguards which the Supreme Court would declare in its interpretation of the Constitution. The argument has two variations, each with its own flaw.

First, an argument could be predicated on Justice Brennan's rational in Katzenbach v. Morgan which posited a power in Congress to weigh values normally considered by the Court and in its congressional wisdom declare certain action unconstitutional (or illegal) which the Court itself would be unwilling so to declare. Justice Brennan conceived a ratchet-like Constitution under which Congress could never turn the safeguards back below a judicially-declared minimum but could increase them, that is, make them more protective of individuals.

S. 158 does not, as its backers suggest, merely turn up the safeguards beyond the Court's minimum by protecting additional "life" in the form of fertilized eggs; it also constricts the liberty of the pregnant woman as recognized in Roe. This, therefore, is not a case like Morgan in which Congress by extending voting rights does not at the same time restrict others' right to vote. S. 158, by protecting fertilized eggs, necessarily restricts the liberty of pregnant women below the minimum recognized in Roe v. Wade. That is a fatal flaw under the Morgan rationale.

Second, the argument in favor of S. 158 could be predicated on Justice Harlan's narrower view, put forward in his dissent in Morgan and in his later opinion in Oregon v. Mitchell, which posits that it is for courts to do the necessary constitutional value-weighing, but that Congress may play a special fact-finding role so that courts may know the facts to which to apply their values. The idea behind S. 158 here would be seen as showing the Supreme Court that its factual determination of when "life" interests become important was incorrect--that "life" interests are present not just from the moment of viability but from conception.

It is conceivable that medical science could establish that those qualities we identify as life are present at conception, but I doubt that any hearings in Congress based on current knowledge could lead to a determination like that contained in S. 158. The problem is not an inadequate collection of facts. Federal judges can read medical journals as well as can members of Congress. The issue is one of values--when to attach the label "life" to facts which are already reasonably well known. In short, the Harlan rationale is inapposite in this situation. This is value-judging of the Brennan type, and seen as such, it fails for the "ratcheting" reasons noted above.

I have few qualms in predicting that the Supreme Court, as it is now or may hereafter be reasonably composed, would find a statute patterned after section 1 of S. 158 unconstitutional.

IV

There are several ways for those dissatisfied with *Roe v. Wade* to pursue their goals. The Constitution could be amended, though that would raise federalism and accommodation problems (I & II above) if S. 158 were used as a model. The Court itself could be induced to overrule *Roe*, though that would have severe consequences in terms of engendering disrespect for the Court as a relatively non-political institution. Finally, if absolutist positions could be eschewed, opponents in the several states could proceed within the framework of *Roe* to pass statutes which would promote "life" interests without encroaching upon the constitutionally protected minimum rights of pregnant women.[1]

These courses of action, despite their political uncertainty, would not share the constitutional defects inherent in S. 158.

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[1] The greatest opportunities come at the cusp of the second trimester when fetal and individual interests are most nearly in balance. The requirement of use of prostaglandins to induce abortions, thereby increasing survivability odds for the fetus, appears to me to be an open issue even after *Planned Parenthood* v. *Danforth*, provided it could be shown that the procedure was in fact readily available. The decision in *Colautti* v. *Franklin* also appears to be limited by the criminal setting chosen for the legislation; unambiguous civil requirements regarding care for fetuses might survive Supreme Court scrutiny.

STANFORD LAW SCHOOL

April 24, 1981

The Honorable Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in response to your letter requesting my opinion on the constitutionality of Section 1 of S.158. As you point out, the section raises squarely the question of whether Congress has the authority to define legal/constitutional personhood in the face of Supreme Court decisions on abortion. I believe emphatically that Congress does not have such power under the Fourteenth Amendment. The argument of the proponents of the bill is that Congress also has its own responsibilities for upholding and interpreting the Constitution, and surely this is true. But it is only true when Congress' reasonable and good faith reading of the Fourteenth Amendment does not undermine the Supreme Court's prior declarations of individual rights. In Roe v. Wade, the Supreme Court spoke directly to the constitutional right of women to make procreational decisions. This has not been a popular decision in some quarters. But the basis for judicial interpretation of the Constitution is that the judiciary is detached from the pressures of constituency politics and such negative reactions. An effective reversal of a Supreme Court decision because of the political opinions of those who oppose it threatens the whole system of constitutional order and interpretation.

I know these views have been forcefully spelled out in greater detail by many leading constitutional law experts. I appreciate the opportunity to add my name and opinion to the list of those opposing this woefully wrong piece of legislation.

Best personal regards,

Barbara Allen Babcock
Professor of Law

BAB:ba

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
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1981 APR 21 AM 10:44

April 17, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
of Powers
The United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter regarding S.158. I am in the process of preparing a memorandum on H.R. 900, at the request of Representative Don Edwards. I would like to send your committee a copy of this memorandum, which should be completed by April 20. I very much appreciate your soliciting my opinion, and hope that my memorandum is helpful to you in your deliberations.

Sincerely,

Lea Brilmayer

Lea Brilmayer
Assistant Professor of Law

LB/mab

The Human Life Bill, the Bill of Rights, and the Congressional Enforcement Power under Section 5 of the Fourteenth Amendment

Lea Brilmayer[1]

This memorandum discusses whether S.158 and H.R. 900, the proposed "Human Life Bill," could, consistently with the constitutional limits on federal power, be used to alter the result in Roe v. Wade. Some case law suggests, albeit ambiguously, that a definition of Fourteenth Amendment rights adopted by Congress pursuant to its section five enforcement powers need not necessarily conform to the Supreme Court's. Even conceding this point arguendo, there remains a question of whether such exercise of section five power might not infringe constitutional liberties protected by the Bill of Rights. This memorandum argues that in the exercise of its section five powers, Congress is still constrained by the Fifth Amendment Due Process Clause. Section five legislation cannot be used to authorize or require the States to take action that would violate the Fifth Amendment if done by the federal government alone and the Fourteenth Amendment if done by the states without federal authorizing legislation. Because the Fourteenth Amendment restrictions at issue in Roe v. Wade are congruent to Fifth Amendment due process limits on the federal government, section five legislation cannot be used to alter the result in that case.

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[1] Lea Brilmayer is Assistant Professor of Law at The University of Chicago.

Introduction

H.R. 900 and S.158 provide that "the Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." They further rely upon the enforcement power granted by section five of the Fourteenth Amendment to extend that amendment's due process protections to all human life, so defined. In a subsequent section the jurisdiction of inferior federal courts to hear cases regarding these issues is restricted.[2] One apparent consequence of this legislation would be to alter the result in Roe v. Wade,[3] which declared existing state abortion laws to be inconsistent with the Fourteenth Amendment. Roe was premised in part upon the lack of medical and moral consensus that human life begins at conception rather than at birth.[4] Since a compelling state interest was deemed necessary to justify the invasion of privacy that abortion restrictions entail,[5] this lack of consensus undermined the state's claim to regulate. With a Congressional enactment to reinforce this asserted state interest, the pregnant woman's privacy rights might be outweighed by the due process rights of the fetus.

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[2] While the jurisdictional issues are not addressed in this memorandum, the discussion concerning the Bill of Rights limitations, infra, is pertinent there also.

[3] 410 U.S. 113 (1973).

[4] 410 U.S. at 159. It also, however, declared categorically that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158.

[5] 410 U.S. at 155.

Although it cannot be predicted with any certainty, it seems fairly likely that the bill would require, rather than merely permit, the states to criminalize abortion. One proponent of the bill claims that no state would be compelled by this bill to outlaw abortion,[6] and anticipates that "Congress could well choose to delay any further enforcement action until it sees the extent of state compliance."[7] But his reasoning relies upon an erroneous belief that "privately performed abortions are not state action."[8] The state action would inhere in the failure to treat abortion as within the state's homicide statute. As the Roe court recognized,[9] it is inconsistent to recognize fetuses as having Fourteenth Amendment rights while prescribing substantially more lenient penalties for abortion than for homicide. If differential treatment of born and unborn persons were impermissible under this bill, the result would be either mandatory extension of existing homicide laws to the unborn or invalidation of existing homicide laws at the behest of accused murders of adults.[10] For this reason, and because the bill's proponents contemplate further congressional action if the states do not comply, this memorandum discusses the constitutional issues in terms of both permitting and requiring the states to make abortions a criminal offense.

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[6] Galebach, A Human Life Statute 23 (pamphlet reprinted from The Human Life Review, Winter 1981).

[7] Galebach, note 6 supra at 26.

[8] Galebach, note 6 supra at 23.

[9] 410 U.S. at 158. Cf. Keeler v. Superior Court, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 617 (1970) in which the defendant had attacked the mother, resulting in the severe head fractures and death to the fetus. The California Supreme Court held that the state homicide law did not include fetuses, who were not "persons."

In evaluating the constitutionality of these results, this memorandum addresses a fairly limited set of issues. First, it assumes that the bill is not merely a request for the overruling of Roe v. Wade. There is of course a large literature criticizing the reasoning that the Court used in reaching its result. But that is beside the point for purposes of section five of the Fourteenth Amendment, because that section raises the possibility that Congress might influence the scope of Fourteenth Amendment rights without having to persuade the Court that it had been wrong in the first instance. Second, the memorandum focuses only on the effects of H.R. 900 and S.158 on the precise facts of Roe. There are undoubtedly other controversial implications of a bill of this nature, but the constitutionality of these is beyond the memorandum's scope.

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[10] This is identical to the objections that would be made to a homicide statute providing different penalties for the killing of persons of different races.

Discussion

Most of the attention to the human life bill has focused on whether the bill is a valid exercise of section five enforcement power. In particular, it is not clear whether Congress is empowered to redefine the content of the Fourteenth Amendment, as opposed to specifying its remedial implications, after a contrary Supreme Court ruling.[11] There are about a half dozen precedents on this issue, most dealing with voting rights legislation.[12] Perhaps because of the analytical subtleties surrounding the section five issue, the other constitutional questions discussed in those cases have been largely neglected in the debate over the human life bill. Yet these other, less intractable, issues are of great importance in assessing its constitutionality. An example based upon a recent Supreme Court case will illustrate why section five legislation tends to generate constitutional difficulties even apart from the problematic reach of section five authority.

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[11] See, e.g., Gordon, *The Nature and Uses of Congressional Power under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 75 N.W.U. L. Rev. 656 (1977); *Galebach*, note 6 *supra*.

[12] These cases are listed and discussed in note 16 *infra*, and the accompanying text.

In Thomas v. Indiana Employment Security Division Board[13] the Supreme Court held that Indiana might not deny unemployment compensation to a Jehovah's Witness who had quit his job when transferred to a department engaged in the manufacture of war materials. The Court acknowledged the tension between the right to free exercise, which supported the claim to unemployment, and the prohibition against government establishment of religion, which suggested that the state should not subsidize religious beliefs.[14] Both are Fourteenth Amendment rights, because the First Amendment applies to the states only through incorporation into the Fourteenth Amendment due process clause,[15] and Congress might therefore attempt to alter this result through exercise of section five enforcement powers. To pose a cruder example, Congress might try to enforce Fourteenth Amendment establishment clause rights by prohibiting state tax exemptions for religious institutions, or Fourteenth Amendment free exercise rights by authorizing states to build churches. In any of these instances, Congressional action would have to be evaluated under the First Amendment, as well as under section five of the Fourteenth. More generally, Congressional attempts to alter the contours of Fourteenth Amendment rights raise potential problems under the Bill of Rights where they restrict the exercise of competing freedoms.

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[13] 49 L.W. 4341 (April 6, 1981).

[14] 49 L.W. at 4345.

[15] Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).

In every precedent interpreting Congressional power under section five, there have been competing constitutional claims that had to be addressed once the section five issue was resolved.[16] This is no surprise, because reliance upon section five power does not immunize federal legislation from other constitutional challenge. The two most recent section five cases are particularly instructive. In City of Rome v. U.S.[17] the Court addressed a federalism objection to voting rights legislation that required political subdivisions to win the Attorney General's prior approval of changes in electoral practices. It also rejected an argument that federal failure to approve those changes violated the First, Fifth, Ninth, and Tenth Amendment rights of the voters because the city had been unable to hold elections.[18] That same term, the Court upheld the "minority business enterprise" provision of the Public Works Employment Act in Fullilove v. Klutznick.[19] In the course of its opinion, it considered and rejected a Fifth Amendment objection, for the plaintiffs had argued that the act violated the due process rights of non-minority contractors.[20]

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[16] In South Carolina v. Katzenbach, 383 U.S. 301 (1966) the Court cited Williamson v. Lee Optical, 348 U.S. 483 (1955) and Railway Express Agency v. New York, 336 U.S. 109 (1949) to refute what was in essence a substantive due process objection to the coverage formula of the voting rights legislation under scrutiny. Katzenbach v. Morgan, 384 U.S. 641 (1966), addressed, in addition to the section five issue, a claim that the voting rights legislation in question worked an invidious discrimination in violation of the Fifth Amendment. 384 U.S. at 656. Oregon v. Mitchell, 400 U.S. 112 (1970), invalidated legislation based upon section five because of the Tenth Amendment and other federalism concerns. While some of these cases concern statutes enacted pursuant to the Fifteenth Amendment enforcement powers, they involve substantially similar legal issues and will be referred to as "section five cases."

[17] 100 S. Ct. 1548 (1980).

[18] 100 S. Ct. at 1565. The Court held that the federal government was not responsible for the failure to hold the elections.

[19] 100 S. Ct. 2758 (1980).

The difficulty with the proposed human life bill, even if the section five issue is conceded arguendo, is that it authorizes or requires the states to take action that the federal government might not be able to take directly, because of the Fifth Amendment.[21] The problems are precisely analogous to those raised by the freedom of religion hypothetical. *Fullilove* is very nearly on point, because it held that in implementing constitutional prohibitions against state racial discrimination, Congress is constrained by comparable restrictions imposed on the federal government by the Fifth Amendment:

> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. 22

Regardless of the reach of section five power, Congress could not authorize or require "separate but equal" as an interpretation of the Fourteenth Amendment without running afoul of the Fifth.[23]

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[20] 100 S. Ct. at 2775-82.

[21] Whether direct federal legislation would violate the Fifth Amendment is discussed at greater length in the text at notes 36-46, *infra*.

[22] 100 S. Ct. at 2781.

[23] L. Tribe, *American Constitutional Law* 272 (1978).

The only colorable distinction between the legislation in Fullilove and the proposed human life statute is that Fullilove concerned direct involvement between the federal government and individual contractors, while the human life bill only addresses state action.[24] It can therefore be argued that while the Fifth Amendment was applicable to the federal action in Fullilove, only the Fourteenth would be applicable to the federal bill in question here. Whatever force this distinction might have is undercut by City of Rome, where plaintiffs' First and Fifth Amendment objections were addressed to the impact federal action had had on their relations to local government. Moreover, there is no reason that the Bill of Rights should be inapplicable merely because the federal government acts indirectly, through requiring or facilitating state activity. This point is clearest where the state activity in question is required by the federal government. If the federal government is constitutionally entitled to adopt the legislation, it is binding upon the states because of the Supremacy Clause; thus objections to what the state is doing must be based upon limitations on the federal government.

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[24] By its terms, the bill refers only to "enforcing the obligations of the States not to deprive persons of life without due process of law." Although the law on this issue is still not completely settled, Congress probably could reach private action under its section 5 power. See, e.g., U.S. v. Guest, 383 U.S. 745 (1966); Fullilove v. Klutznick, supra. Arguably the state action limit is more compelling in the present context, because it is based upon privacy considerations. The privacy considerations in the abortion context were shown by Roe v. Wade to rise to constitutional dimensions.

The pertinenceof the Bill of Rights provision is equally clear, however, when the federal government merely authorizes the state activity. This point is amply demonstrated by Shapiro v. Thompson,[25] in which defendants had argued that state welfare residency requirements were justified by Congressional approval manifested in the social security laws. The Court denied that residency requirements were dictated or authorized by federal statute:

> But even if it could be argued that the constitutionality of [the federal statute] is somehow at issue here, it follows from what we have said that the provision, infofar as is permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. [26]

The Court cited Katzenbach v. Morgan, a section five case, even though the federal statute in question had not relied upon section five. Obviously, then, such a result would be equally unconstitutional if the statute had been enacted in reliance upon section five powers.

Shapiro should be contrasted with the commerce clause context, in which Congress can authorize the States to take action that would otherwise be unconstitutional. In Prudential Ins. Co. v. Benjamin[27] the Supreme Court rejected arguments that the

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[25] 394 U.S. 618 (1968).

[26] 394 U.S. at 641. The Court gave as an example the inability of Congress to authorize "separate but equal" education for the races.

[27] 328 U.S. 408 (1945). The Court specifically declined to rely solely upon Congressional fact-finding superiority. 328 U.S. at 425.

McCarran Act could not authorize states to adopt certain taxes that would have been invalid without Congressional authorization. These arguments were thought to rest upon an overly restrictive view of Congress' own power to regulate commerce.[28] They equated Congressional power to the power that the states possessed when Congress was silent, because if the former was larger then Congress could enlarge state power through delegation:

> So conceived, Congress' power over commerce would be nullified to a very large extent. For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power. 29

In short, it is because Congressional power to regulate commerce is larger than, rather than congruent to, state power that Congress can authorize state action that would otherwise violate the dormant commerce clause. The principle that reconciles Shapiro v. Thompson and Prudential Insurance is that Congress can increase state power through authorizing legislation only if Congress itself possesses an authority which is larger than the states' and which includes the power it wishes to delegate. Thus, whether Congress can authorize or require the states to criminalize abortion depends upon whether Congress itself would be prohibited from doing so by the Fifth Amendment.[30]

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[28] 328 U.S. at 422. "[I]n this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation."

[29] 328 U.S. at 422.

Several preliminary considerations suggest that the Fifth and Fourteenth Amendment limitations are congruent. The incorporation of the Bill of Rights guarantees into the Fourteenth Amendment was premised in part on the theory that fundamental rights that are guaranteed against federal infringement deserve comparable protection from infringement by the states.[31] Conversely, when the Fourteenth Amendment was interpreted to prohibit state segregation of public schools, this limitation stemming from the civil war amendments was read into the Fifth Amendment limits on federal activity in the District of Columbia.[32] While as a historical matter the framers of the Bill of Rights had certainly not intended to outlaw federal school desegregation, it was thought that the contours of fundamental human rights should not depend upon whether state or federal activity was at issue.[33]

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[30] There may be additional objections, in that the source of Congressional power to do so directly is unclear, but only the Bill of Rights limitation is at issue here.

[31] See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (because the right to jury trial is fundamental to the American scheme of justice, it is binding on state as well as federal government).

[32] *Bolling v. Sharpe*, 347 U.S. 497 (1954)(applying *Brown v. Board of Education*, 347 U.S. 483 (1954) to schools in the District of Columbia). *See also* *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

[33] 347 U.S. at 500 ("In view of our decision that the Constitution prohibits states from maintaining recially segregated public shcools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government").

Yet in some respects federal power is less constrained by the Fifth Amendment than state power is by the Fourteenth. For instance, the federal government has greater latitude in classifying on the basis of alienage.[34] Conversely, there are parts of the Bill of Rights which have been held not to be binding upon the states.[35] To resolve the question of the constitutionality of the proposed human life bill, it is therefore necessary to compare the contours of the Fifth and Fourteenth Amendment guarantees. This will be done, first with regard to substantive due process rights generally, and then with regard to reproductive privacy rights specifically.

Virtually since the inception of the doctrine of substantive due process, the Supreme Court has used the same analysis regardless of whether Fifth or Fourteenth Amendment rights were at stake. When a challenge to a state statute was followed by a challenge to a comparable federal statute, the resolution of the state challenge was held dispositive. Conversely, when the first decision resolved the merits of a federal statute, this effectively disposed of the merits of a later Fourteenth Amendment challenge to similar state statutes. The symmetry can be demonstrated by two pairs of cases. In Heiner v. Donnan[36] the executors of Donnan's estate challenged a conclusive presumption that gifts made within two years of death were made in contemplation of death and should be included in the decedent's estate. This Fifth Amendment challenge to a federal statute was resolved by citing Schlessinger v. Wisconsin,[37] a Fourteenth Amendment challenge to a virtually identical state law:

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[34] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[35] Cf., Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

[36] 285 U.S. 312 (1932).

> [It is not] material that the Fourteenth Amendment was involved in the Schlessinger case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. [38]

The Court declared that unless it was willing to overrule the earlier case, the federal statute logically had to be invalidated also.[39]

The converse situation was presented in West Coast Hotel v. Parrish.[40] A District of Columbia minimum wage law had earlier been declared invalid under the Fifth Amendment in Adkins v. Children's Hospital.[41] In upholding the state minimum wage law under the Fourteenth Amendment, the Court was compelled to reconsider and overrule its earlier decision under the Fifth. While these two sets of decisions appear, to the modern eye, rather quaint in their discussions on the merits of the substantive due process claims, the conclusion that restrictions on federal and state action are identical is still good law. This can be demonstrated in the context of reproductive privacy rights, specifically.

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[37] 270 U.S. 230 (1925).

[38] 285 U.S. at 326.

[39] 285 U.S. at 329.

[40] 300 U.S. 379 (1937).

[41] 261 U.S. 525 (1923).

The first litigation raising due process objections to restrictions on the use of Medicaid funds for nontherapeutic abortions was a Fourteenth Amendment challenge to a Connecticut provision, Maher v. Roe.[42] The Connecticut legislation was upheld. When the federal Hyde Amendment restricting use of Medicaid funds for abortions was challenged in Harris v. McRae,[43] the Court found the prior decision controlling. Following the rationale in Maher and citing it at every turn of the way, the Court upheld the federal legislation also. Fourteenth Amendment precedents appeared to be cited virtually interchangeably, without any apparent recognition that it might be argued that the two due process clauses should be handled differently.[44] The same assumption is made in the literature.[45] It is hardly unthinkable that the Court would hold the Fifth and Fourteenth Amendment standards identical in a challenge to the proposed human life bill: in other reproductive privacy rights cases, it has already done so.[46]

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[42] 432 U.S. 464 (1977).

[43] 100 S. Ct. 2671 (1980).

[44] Interestingly enough, South Carolina v. Katzenbach itself relied upon cases validating state legislation in meeting what appeared in essence to be a substantive due process argument against voting rights legislation. Note 16, supra.

[45] For instance, one article tried to anticipate how Harris v. McRae would be decided by applying the reasoning of Maher, assuming that Fifth and Fourteenth Amendment analysis would be interpreted identically. Abortion, Medicaid, and the Constitution, 54 N.Y.U.L. Rev. 120, 136-50 (1979).

[46] In referring to the disposition of the District Court in a companion case to Harris, the Court cited with apparent approval its assumption that "the same reasoning would apply in determining the constitutional validity of both the Illinois statute and the Hyde Amendment." Williams v. Zbaraz, 100 S. Ct. 2694, 2699 (1980).

What would it mean in a challenge to the human life bill that the Fifth Amendment restrictions on the federal government were identical to the Fourteenth Amendment limits recognized in Roe v. Wade? Most obviously, the federal government would not itself be able to enact the sort of legislation that Texas had enacted there: legislation making abortion a crime. The Court had concluded in Roe that

> "[i]n view of [the differing beliefs of when life begins] we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." 47

Congress may not, consistently with the Fifth Amendment, override the rights of pregnant women either by adopting one theory of life. While Congress' findings of scientific fact are of course entitled to deference, they should receive exactly the same amount of deference due Congressional fact-finding in other Fifth Amendment cases.

Conclusions

The analytical subtleties of section five of the Fourteenth Amendment seem to have an unusual hypnotic effect. The invocation of Congressional enforcement power has served, in the context of the human life bill, to divert attention to mysterious issues involving Marbury v. Madison when the problem could be resolved through garden variety Fifth Amendment analysis. Only if the proposed Congressional action is consistent with the Fifth Amendment--and in this case it is not--need these conceptually difficult issues be addressed. Invocation of section five power does not give the federal government a way to require or authorize states to take action that neither the states nor the federal government could take by itself.

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47. 410 U.S. at 162.

UNIVERSITY OF CALIFORNIA, BERKELEY

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April 6, 1981

APR 10 1981

The Honorable Don Edwards
House of Representatives
Committee on the Judiciary
Congress of the United States
Washington, D.C. 20515

Dear Congressman Edwards:

I am responding to your letter of March 19 concerning the "Human Life Statute."

I am not at present in a position to attempt any extended analysis and I am sure that others have already followed the lead of the Congressional Research Service in the memorandum you sent me. Suffice it to say at this time that, as a matter of existing constitutional doctrine, see especially Katzenbach v. Morgan, fn. 10, I believe the statute raises serious constitutional questions.

I would be happy to talk further with you or to Subcommittee Counsels on this if it would be helpful.

All best wishes.

Sincerely,

Jesse Choper
Professor of Law

JC:ds

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May 4, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

You have asked me to respond to constitutional questions concerning section 2 of the proposed "Human Life Statute." S.158. Your letter was forwarded to me here from Stanford Law School.

On April 9, 1981, I wrote to Congressman Edwards concerning section 1 of that statute. (I understand that you were furnished a copy of that letter.) My view was that the constitutional issue concerning section 1 was clear, and that section 1 was clearly unconstitutional. Since I think that section 2 is fundamentally wrong, and a dangerous precedent (a view I will support at the end of this letter), I would prefer to conclude that section 2 is also clearly unconstitutional. My honest opinion as a scholar in both the field of constitutional law and that of federal jurisdiction, however, is that the question whether section 2, standing alone, would be constitutional has not been resolved by any relevant United States Supreme Court decision, and that there is a substantial chance it would be sustained by the courts. I will try to explain those conclusions as briefly as the complexity of the issue permits.

First, it is important that section 2 does not, as have some similar proposals, close all doors to federal court decision concerning a constitutional issue (E.g. the Helms Amendment concerning school prayer passed by the Senate april 9, 1979). As I read it, state courts would still have the authority, and the responsibility, to enforce the federal constitutional limits surrounding state abortion legislation. Moreover, that responsibility could still be enforced through Supreme Court review of both state abortion convictions, and state court decisions refusing injunctive or declaratory relief. Finally, section 2 would leave open the habeas corpus jurisdiction of the district courts to review constitutional issues in state abortion convictions.

There is considerable constitutional controversy whether Congress can preclude Supreme Court jurisdiction, or all federal court jurisdiction, over a narrow class of constitutional issues. No one knows the answer to those questions, and it would take hundreds of pages to explore all the implications of the issue. The issue raised by section 2 is much narrower. It is whether, as to specified constitutional issues, the jurisdiction of inferior federal courts to grant injunctive and declaratory relief may be withdrawn, while other avenues of federal court jurisdiction are left open. There are, in the federal judicial code, statutes that do something quite similar, and they are of undoubted constitutionality. The 1934 Johnson Act withdraws jurisdiction of the lower federal courts to restrain state public utility rate orders (28 U.S.C. § 1342) and the 1937 Tax Injunction Act (28 U.S.C. § 1341) similarly withdraws jurisdiction to enjoin the enforcement of state tax collections.

The question, then, is whether there are constitutionally significantly differences between the two provisions just mentioned and section 2 of the proposed "Human Life Statute." I can think of three possible distinctions, but I can not, in honesty, conclude that any of them is of constitutional dimension.

First, both the Tax Injunction Act and the Johnson Act require that equivalent state remedies be adequate before federal jurisdiction is withdrawn, while S. 158 does not. I think that would not make S. 158 unconstitutional even if one assumes that in some states unconstitutional restrictions on abortions would be enacted and state courts would require women and physicians to face criminal prosecution to test their constitutional rights. There is respectable authority that states have a _constitutional_ responsibility to provide adequate procedural remedies against substantively unconstitutional state laws. That obligation can be enforced through Supreme Court review of state court decisions denying relief. (_E.g._, _Ward_ v. _Love County_, 253 U.S. 17 [1920].) In short, if lower federal courts are precluded from remedial action, and state judicial remedies are constitutionally inadequate, it is the state law that is unconstitutional and not the withdrawal of federal jurisdiction. That, as I understand it, is the rationale of the case upholding the withdrawal of federal jurisdiction to grant labor injunctions by the Norris-LaGuardia Act. _Lauf_ v. _E. G. Shinner & Co._, 303 U.S. 323, 330 (1938).

The point of this technical analysis is that Congress does have the option of denying the federal trial courts the prime responsibility for enforcing federal rights. Indeed, until after the Civil War it was, in most cases, our system to rely entirely on state courts (with Supreme Court review) to enforce the limited federal law individual rights citizens had against their own states. That for over 100 years our system has been to entrust the primary enforcement of federal rights to the federal trial courts does not prove to me that Congress is constitutionally committed to that pattern.

A second argument, however, is that S. 158 is not phrased in terms of denying jurisdiction in a class of cases (like tax cases and challenges to public utility rate orders), but with reference to the nature of the issues raised. The short answer to that, I think, is that it is a common pattern to grant federal jurisdiction with reference to the nature of the issues, and it is equally within Congress' power to withdraw jurisdiction on that basis. (Indeed, the Johnson Act itself permits commerce clause challenges to state rate orders to be brought in federal court while it withdraws jurisdiction to entertain fourteenth amendment due process challenges.)

The third argument is the most substantial. It can hardly be doubted that Congress' power to control jurisdiction is subject, as are all its other powers, to limitations of the due process clause of the fifth amendment. Nor can it be doubted, given the clearly unconstitutional provisions of section 1 of S. 158, that Congress would be subjectively motivated, in enacting section 2, by an unconstitutional desire to make it more difficult to enforce constitutional rights to free choice in abortion. In some cases, the Supreme Court has decided that an effect of denying constitutionally protected rights, coupled with a legislative purpose to accomplish that result, renders a statute unconstitutional. Washington v. Davis, 426 U.S. 229 (1976). Thus, so the argument goes, section 2 of S. 158 would be unconstitutional since it shares the unconstitutional purpose of section 1, and would have the effect of making constitutional rights to free choice in abortion more difficult to enforce.

This argument is not easily refuted. However, it is not clear, outside of the area of racial discrimination, whether unconstitutional motivation will always invalidate legislation that would be valid if passed for a constitutionally permissible purpose. My own view is that in the particular context of otherwise permissible withdrawals of federal jurisdiction, it is an untenable analysis. In Ex Parte McCardle, 7 Wall. 506 (1868), as well as in Lauf v. E. G. Shinner & Co., supra, the Court was rather pointed in ignoring possible unconstitutional motivations in withdrawing jurisdiction. (On the other hand, McCardle can be distinguished since Congress only withdrew one appellate route to the Supreme Court, leaving a fully effective one open; Lauf v. Shinner can be re-explained on the ground that the supposed constitutional right to a labor injunction had disappeared by 1938.)

My short conclusion, after this lengthy analysis, is that Congress technically has the power to entrust enforcement of federal rights entirely to state courts subject to Supreme Court review; has the power to make that choice on a selective basis; and can even do so because it does not approve of the substance of constitutional decisionmaking by the federal courts.

That, of course, ought not to be the end of the Congressional constitutional enquiry. Congress has the technical power to take a number of reprisals against the federal judiciary because it is unhappy with the course of constitutional decisions. If there are enough votes in both houses, it can remove judges through impeachment. But, since the unsuccessful attempt to impeach Justice Chase during Jefferson's administration, it has become part of our constitutional tradition that federal judges can not be impeached because their decisions are perceived by Congress to be wrong. Congress can cut appropriations for the judiciary to the bone, take away the judges' clerks, provide insufficient new judges to maintain a growing federal docket, and the like. But, since the beginning of the Republic, Congress has wisely (and in a sense constitutionally) recognized that destroying one of the three branches of government is inconsistent with the constitutional plan.

With reference to jurisdictional withdrawals as reprisal for what Congress perceives as unwise constitutional adjudication, the story has been the same. That has occurred on only two occasions, and both of those were during the days of Radical Reconstruction when all longstanding constitutional traditions were either in flux or under attack. Not even during the constitutional crises of the mid 1930's were there proposals to withdraw federal jurisdiction. And, while there have been such proposals on particular issues since the mid 1950's, not once has one passed both Houses of the Congress. I tell my students that Congress is constitutionally responsible, and the mere fact that it possesses some theoretical power to destroy our constitutional systems of government doesn't prove that those powers will ever be exercised.

I hope I can continue to make that statement. Our important constitutional traditions of judicial independence, judicial review, and constitutionally protected individual rights, ought to be more important to reflective members of the Congress than their views, no matter how strongly held, on the abortion issue.

Sincerely,

William Cohen

William Cohen
Merriam Visiting Professor

WC/aw

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April 9, 1981

Congressman Don Edwards
Chairman, Subcommittee on Civil and
Constitutional Rights
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Congressman Edwards:

I apologize for the delay in responding to your letter of March 19. It was forwarded to me here from my permanent academic home at Stanford.

To avoid further delay, I will be brief. H.R. 900 is unconstitutional insofar as it attempts to reverse and dilute a decision of the United States Supreme Court interpreting the minimal guarantees of liberty contained in the Bill of Rights and the Fourteenth Amendment. I would have supposed any school child would give that answer and many of them could even supply the proper citation of authority--Chief Justice Marshall's opinion in *Marbury* v. *Madison*.

That there should be any controversy about this in 1981 is possible only because of some confusion engendered by selective mis-reading of language in some cases dealing with the contentious issue of Congressional power to enforce the Fourteenth Amendment. There is indeed controversy over how far Congress can go to *restrict* state governments beyond the restrictions imposed by the self-executing provisions in the first sections of the thirteenth, fourteenth and fifteenth amendments. I have written on that confused topic. (The article appears at 27 Stanford Law Review 603 [1975]. I don't, I'm sorry to say, have a reprint with me at this temporary base to include with this letter.)

The controversy over the extent of Congressional power to enforce the Fourteenth Amendment would arise in the unlikely event Congress were to outlaw all state restrictions on abortion. That controversy is, however, quite simply irrelevant with reference to H.R. 900. Beneath the welter of theories, *every* Justice of the Supreme Court, and *all* of the divided commentators, agree on two bedrock principles: (1) Congress has *no power* to authorize states to act in ways that would otherwise be *forbidden* by the Fourteenth Amendment; and

(2) the final arbiters of the meaning of the Fourteenth Amendment are the courts. One could elaborate he points endlessly, or could quibble as to why they are so. But no one, until now, has disputed that they are so.

I happen to be one who believes that Congress has considerable power under various clauses in the Constitution to enlarge the protections against state action contained in section one of the Fourteenth Amendment. But my conclusion, like that of every one else, is that Congress can not diminish those protections. In short, to the extent that the 1973 decision in Roe v. Wade protects a woman's free choice in the abortion decision, that freedom can not be qualified by ordinary legislation at the state or federal level. To state another truism, the Constitution can be amended only by an amendment, and not by legislation.

I was rather shocked to discover that the article by Mr. Galebach introduced into the Congressional Record (Jan. 19, 1981, S.288) to support S.158 quotes only one commentator to support his contrary conclusion--and that was language, out of context, from my Stanford Law Review article. One should note that Mr. Galebach is careful not to note my ultimate conclusion, which is diametrically opposed to his. Mr. Galebach does the same thing with every judicial source he cites for his conclusion.

Sincerely,

William Cohen

William Cohen
Merriam Visiting Professor

WC:vs

CCR Center for
Constitutional Rights

853 Broadway • 14th floor • New York, New York 10003 • (212) 674-3303

April 13, 1981

William Cohen
Merriam Visiting Professor
Arizona State University
College of Law
Tempe, Arizona 85281

Re: S. 158/ H.R. 900

Dear Prof. Cohen:

Thank you for the copy of your letter to Congressman Don Edwards. I have taken the liberty of passing a copy along to Senator Baucus who is the ranking minority member of the Senate Subcommittee on Separation of Powers.

John East, who heads that subcommittee, is planning 4 days of hearings on S. 158. On April 23 and 24, he will hear anti-abortion scientists on the irrelevant question of when life begins. He has scheduled additional hearings on May 4 and 6 to cover legal and constitutional aspects.

I would like to suggest that you write to Senator East and request to testify as the author of the law review article most heavily relied on by Galebach. If East's staff is not fully educated, you may slip by on their list of witnesses . It would be quite important to insert your views into their ironclad and self-serving unanimity. If that is not successful, I have also suggested to Senator Baucus' staff that they call you as one of their witnesses. It is not clear, however, how much time Baucus will be permitted to present the other side.

We are encouraging a number of experts to write to Senator East asking to testify. Do let me know if you do and if you receive a response.

Thank you for your good work on this.

Sincerely,

Rhonda Copelon

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

1981 APR 23 AM 9 03

April 20, 1981

The Honorable Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

In response to your letter of April 13 with reference to S.158, I doubt that even Senator Helms believes that Congress has the final word on the meaning of "life" under the Constitution. Even he cannot have forgotten United States v. Nixon, 418 U.S. 683 (1974), so quickly.

I can only conclude that Senator Helms, if he is to be taken seriously, is seeking to persuade the Congress of the United States (1) to engage in an episode in futility and (2) to make a laughing stock of itself.

Sincerely,

Vern Countryman
Vern Countryman
Professor of Law

VC:kah

HARVARD LAW SCHOOL
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1981 MAY -1 PM 2:06

28 April 1981

Honorable Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am very sorry for the delay in responding to your letter of April 13, concerning S.158, the bill to define person to include such human life as exists from conception and to deprive the inferior federal courts of jurisdiction in any case involving a State law prohibiting abortion. Your letter reached me at an extraordinarily busy time.

I have written critically of the decision in *Roe* v. *Wade*, but I regard S.158 and similar measures as radical attempts to subvert our constitutionalism in ways that would quickly lead to attacks upon fundamental civil liberties such as personal security and freedom of speech, including freedom of the press. I say this for your information but I am reluctant to make any statement on the subject right at the present time.

I am currently Chairman of the Governing Board of Common Cause. The Board will vote later this week upon whether Common Cause should oppose such legislation as subversive of their constitutionalism, whatever may be the rights and wrongs of the debate about abortion. It would be unseemingly for the Chairman to express a public opinion while the Board has the question under consideration.

If Common Cause takes a position in opposition to S.158, then I shall be glad to give any assistance I can in attempting to debate the measure. Indeed, I might be willing to help as an individual even if Common Cause should not so vote. It is only the pendency of the matter before the Governing Board that necessitates my present silence.

With best wishes,

Sincerely,

Archibald Cox

Archibald Cox

AC:has

THE
GEORGE
WASHINGTON
UNIVERSITY
Washington, D.C. 20052 / The National Law Center

10 08

May 21, 1981

Senator Max Baucus
1107 Dirksen Building
Subcommittee on Separation
of Powers
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Senator Baucus:

I apologize for the delay in responding to your request for my opinion concerning "The Human Life Statute." Your request was forwarded to me in the last part of the semester, a period of maximum confusion and minimal available time. Since my response is so late, I will limit the scope of my remarks concerning the constitutional issue. If you feel any additional commentary is necessary, please feel free to contact me. I might note at the outset, that like most students of constitutional law, I believe the proposed legislation to be unconstitutional. But as is true of most constitutional issues, such a determination is not self-evident.

It is important at the outset to be clear regarding what the Court said in Roe v. Wade regarding fetal life. The Court's determination that a fetus is not a "person" within the meaning of the fourteenth amendment was based on an historical and textual foundation. Simply, the Court found no basis for concluding that the framers intended to include the fetus as a beneficiary of the fourteenth amendment guarantees. On the other hand, the Court's comments concerning the lack of agreement on when human life begins were included only on the question of when the state could be said to have a compelling interest in the potentiality of life, not on the question of whether the fetus is a person.

This distinction is important in appreciating the nature of the proposed legislation. The Act does not merely correct the Court's fact-finding regarding when human life is sufficiently well developed to be considered compelling for constitutional purposes. Rather, the statute undertakes to revise and overturn the Court's interpretation of the constitutional text itself. It is this distinction, I believe, that provided the basis for Professor Gordon's conclusion that the proposed Human Life Act would be unconstitutional. Gordon, The Nature and Uses of Congressional Power Under Section 5 of the Fourteenth Amendment to Overcome Decisions of the Supreme Court, 72 Nw. U.L. Rev. 656 (1977). Whatever the congressional power to inform the judicial fact-finding on when an interest becomes compelling, the proposed legislation is not drafted in that form. It is a direct rejection of the judicial interpretation of the meaning of "person" within the fourteenth amendment.

Understood in this light, the proper question to be asked is whether Congress can overturn a decision of the Supreme Court concerning the meaning of "person" within the fourteenth amendment. In the Civil Rights' Cases, the Court held that the congressional power under section 5 of the fourteenth amendment was remedial -- Congress could legislate to correct state action violating section 1 of the fourteenth amendment. The Court rejected the proposition that Congress had power under the fourteenth amendment, §5 to define the substantive scope of the fourteenth amendment, §1. This approach to congressional power under §5 was adopted by Justice Harlan in his dissent in Katzenbach v. Morgan. For Justice Harlan, §5 gives Congress "wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action," but the "substantive scope" of the amendment was "one for the judicial branch ultimately to determine." Simply, under §5 Congress has power to enforce and provide remedies for the substantive rights in §1 as those rights are defined by the courts. This approach to the enforcement powers of Congress under §5 has most recently been adopted by Justice Stewart and Rehnquist, dissenting in City of Rome v. United States, 100 S.Ct. 1548 (1980). Justice Rehnquist characterized the Court's holding in that case as establishing "that Congress effectively has the power to determine for itself that [particular] conduct violates the Constitution." But he argued: "This result violates previously well-established distinctions between the Judicial Branch and Legislative or Executive Branches of the Federal Government."

For those Justices adopting this remedial position regarding Congress' enforcement powers under §5, the Human Life Statute is almost certainly unconstitutional. Congress would not be exercising remedial powers but would actually be undertaking to define the substantive scope of section 1 of the fourteenth amendment. For such Justices, this would be an impermissible confusion of the proper role of Congress and the courts in enforcing the fourteenth amendment guarantees.

The view that congressional enforcement power under §5 of the fourteenth amendment is limited to remedial, corrective legislation is, however, a minority position. In Katzenbach v. Morgan Justice Brennan, for the Court stated: "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Citing McCulloch v. Maryland, the Court adopted a broad perspective on Congress' enforcement powers under §5, including the power to define the substantive scope of the fourteenth amendment, §1, guarantees. Congress is not, therefore, limited to remedial legislation but may in fact enlarge and expand the substantive scope of the constitutional guarantees. This perspective on the nature of congressional power under the Civil War Amendments was subsequently accepted in Jones v. Mayer and Runyon v. McCrary (interpreting the thirteenth amendment, §2 congressional power) and Oregon v. Mitchell and City of Rome v. United States (interpreting the power of Congress under the fifteenth amendment, §2).

City of Rome, the Courts most recent pronouncement on the congressional enforcement power, recognized congressional power under the fifteenth amendment, §2 to prohibit state voting practices that have discriminatory effects on the exercise of the franchise even though the section 1 guarantee, as interpreted by the Court, prohibits only purposeful discrimination. "It is clear. . . that under §2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate §1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in MuCulloch v. Maryland."

The Court's emphasis on "appropriate" in City of Rome is crucial. In all of the Court's decisions interpreting congressional enforcement powers under the enabling clauses of the

Civil War Amendments, the Court has emphasized that Congress can enact "appropriate" legislation to "enforce" the guarantees in §1 of the Amendments. The Court has emphasized that this does not give Congress the power to dilute those guarantees as they have been established by the Supreme Court. Indeed, the danger of such dilution was stressed by Justice Harlan in his dissent in Katzenbach v. Morgan. He warned that if the Court recognized congressional power to expand the equal protection and due process guarantees, he could not "see why Congress should not be able as well to exercise its §5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." But the majority in Katzenbach answered this charge in an extremely important footnote. "Contrary to the suggesion of the dissent, §5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this court.' We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be -- as required by §5 -- a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." This position has never been repudiated by the Court, and indeed, has either been expressly or implicitly affirmed in subsequent decisions.

In this regard, the Human Life Statute fails the constitutional test. Both in purpose and necessary effect the statute is designed to dilute or abrogate the right of the pregnant woman to choose whether or not to terminate her pregnancy which was recognized in Roe v. Wade. This Congress cannot do even under the broad view of the congressional enforcement power. We could, of course, blind our eyes to the purpose and necessary affect of the law and view it as simply a benign measure expanding the class of beneficiaries under the fourteenth amendment, §1. But the statute involves fundamental personal rights of the woman and such an approach would be unconscionable. The clear intendment of the measure and its practical effect is to undermine the constitutional rights established in Roe.

It is my belief that members of the Court such as Justices Brennan, Marshall, Blackman and White, who dissented so vigorously in the abortion funding cases claiming a dilution of the rights recognized in *Roe*, would characterize the proposed legislation as an effort to undercut constitutional rights established by the Court. Thus, the very Justices who have been primarily responsible for a broad perspective of the congressional enforcement power under the Civil Rights Amendments, would, in my judgment, not view the proposed legislation as consistent with prior decisions. They would not view the Human Life Statute as an *enforcement* of the due process guarantee or as *appropriate* legislation to implement that right.

It is, of course, impossible to forecast with complete accuracy what the Court would do on any constitutional issue. Constitutional law is necessarily highly subjective and indefinite. Nevertheless, combining the view that congressional enforcement power is limited to corrective remedial legislation with the view that Congress, while having power to define the substantive guarantees cannot dilute or abrogate rights recognized by the Court, would be determinative that the human life statute is unconstitutional.

This is my own personal conclusion as well. While I do believe that Congress has broad substantive powers under the Civil War Amendments, I do not believe that this is a carte blanche for Congress to undercut personal rights established by judicial decision. To allow the Congress to undertake this type of rewriting of the Constitution is to ignore the amendment process and undermine the judicial role in interpreting the Constitution as it has developed since *Marbury v. Madison*. If we recognize congressional power to rewrite the Constitution as it has been interpreted through Supreme Court decisions by ordinary legislation, we invite a significant restructuring of congressional and judicial roles in constitutional interpretation. While I do not always agree with Supreme Court decisions, I would hate to think that they could overturned by a simple majority vote in the Congress. While I might be happy today with some of the results achieved by this congressional amendment process, there is no assurance that such "favorable" legislation would continue in the future. I would not at this stage in our constitutional development be willing to turn over the job of constitutional interpretation to the Congress.

I hope some of the above views are helpful. As I indicated at the outset, the limited time available necessitated a rather summary statement of my views and the basis for them. Again, if you feel additional explanation is called for, I will be pleased to do anything that I can.

Sincerely yours,

C. Thomas Dienes
Professor of Law

New York University
A private university in the public service

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Telephone: (212) 598-2555

Norman Dorsen

1981 APR 28 AM 9 39

April 24, 1981

Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in reply to your letter of April 13, requesting my opinion on the power of Congress under Section 5 of the Fourteenth Amendment to enact S.158, that is, to define personhood in the face of Supreme Court decisions on abortion. In my opinion the Congress lacks such power.

The Supreme Court, in Roe v. Wade, 410 U.S. 113 (1973), recognized that a woman in consultation with her physician has a constitutional right to choose whether or not to bear a child. The elements of that right were spelled out in the opinion of the Court and have been reaffirmed and refined in numerous Supreme Court decisions since 1973. Whatever disagreements may remain among members of the Court as to the precise reach of the right of privacy recognized in Roe v. Wade, there is no question that the right exists and indeed has been strengthened by constant exercise over almost a decade. It is the law of the land.

A decision by Congress to declare that a fetus is a "person" would effectively destroy the constitutional right. It is argued that Congress has the power to achieve this end -- and in effect amend the constitution -- because a very few Supreme Court cases, most notably Katzenbach v. Morgan, 384 U.S. 641 (1966), have held that Congress has some authority under Section 5 to prohibit the states from engaging in certain conduct even though the Court would not otherwise have concluded that such state action was proscribed by the Fourteenth Amendment.

But I do not believe that the doctrine announced in the Morgan case authorizes Congress to define a fetus to be a person from the moment of conception. The Supreme Court stressed that Section 5 "grants Congress no power to restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment. 384 U.S. at 651-52 n. 10. The Court's reason was that Section 5 merely gives Congress the power "to enforce" the Amendment, and a dilution of its guarantees is not an "enforcement". This conclusion was challenged by Justice Harlan in dissent, 384 U.S. at 667-68, and it has been questioned by some commentators. But I know of no authoritative decision that supercedes the Supreme Court's expressed distinction between expanding or contracting the reach of the Fourteenth Amendment.

I do not discuss here whether it would be desirable as a matter of policy for Congress to enact S. 158 or a similar measure. Suffice it to say that the bill in principle would be contrary to the decision in Roe v. Wade, it would create extraordinary problems of enforcement (compare Griswold v. Connecticut, 381 U.S. 479, 485 (1965)), and it would circumvent the established process of amending the Constitution.

Wholly apart from these policy considerations, I believe that Congress lacks power under the Constitution to enact S. 158.

Sincerely,

Norman Dorsen
Stokes Professor of Law

ND/jam

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

April 28, 1981

Senator Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

This is in response to your letter of April 13, 1981, requesting my views as to the constitutionality of Section 1 of S. 158. My response may be summarized as follows: Section 1 is amenable to a straightforward interpretation under which it should be sustained as constitutional. Under an alternative interpretation, however, Section 1 raises grave constitutional questions.

Competing interpretations of Section 1 exist because Section 1, being merely declaratory, does not address the ultimate legal question in the abortion controversy, whether states may prohibit abortions. In particular, Section 1 does not deem state laws prohibiting abortions to be constitutional. Absent such an express statement, there is room for an interpretation of Section 1 that would avoid a direct constitutional confrontation over whether Congress may overturn the Supreme Court's decision in Roe v. Wade.

I. The Nonconfrontational Interpretation of Section 1

It is perfectly possible for the Supreme Court to accept Section 1's declaration about when life begins and nevertheless to strike down at least some state laws prohibiting abortion as violative of a pregnant woman's right of privacy.* Nothing in Section 1 challenges the formal holding of Roe v. Wade. It merely grants increased legal status to the fetus.

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* I do not address the question whether Section 1 requires states to protect fetuses, or what process might have to attend deprivation of a fetus' right to life. It should be noted, however, that even if the fetus is a person for purposes of the fourteenth amendment, it is a person different in important respects from other persons protected by the fourteenth amendment. Therefore, the process due before a fetus may be deprived of life might well differ from the process due before other persons may be deprived of life.

As written, the Section's principal effect is to require the Court to take account of the fetus' new status under the fourteenth amendment in considering a state's interest in protecting a fetus. Accepting Section 1, and therefore acknowledging the "personhood" of the fetus, nothing in Section 1 precludes the Court from balancing the fetus' strengthened status against a pregnant woman's right of privacy. Nor does Section 1 dictate the result of that balancing process. Even with Section 1 in place, the Court might well conclude that the balance should be struck in favor of the woman. This would seem particularly likely if the case presented to the Court involved the fetus of a rape or incest victim, a fetus known to be terminally ill (as in the case, for example, of a fetus detected as having Tay-Sachs disease), or a fetus whose delivery would threaten the health of the mother. Section 1's broad brush approach permits no exceptions. And even in the case of routine pregnancies, the Court might conclude that the constitutional balance continues to rest in favor of the woman.

In short, Section 1 offers the Court the opportunity to sustain it as constitutional, to give it meaningful effect in striking a balance, and, if the Court concludes the Constitution so requires, to adhere to its formal holding in *Roe v. Wade* In view of the grave constitutional difficulties that would attend the most likely alternative interpretation of Section 1, difficulties discussed below, this limited view of the Section's effect may have an irresistible appeal.

It is true that Section 1 undermines some of the reasoning employed in the *Roe* opinion. *Roe* relies in part on the Court's finding that the fetus is not a person within the meaning of the fourteenth amendment to conclude that a state has an insufficient interest in protecting the fetus to warrant intruding upon the pregnant woman's right of privacy. But to the extent the *Roe* opinion states what might happen to state abortion laws if the fetus were a person, as Section 1 seeks to establish,** the statements constitute dicta not necessary to the decision of the case. Once the Court's opinion concluded that the fetus is not a person, all discussion of what would happen if the fetus were a person became superfluous.

More importantly, such discussion was not offered in the context of a case in which any result turned upon that discussion. In light of this less than ideal context, it is not surprising that the superfluous discussion in *Roe* was seriously incomplete. In particular, the Court had no need to consider the inroad upon a pregnant woman's rights that

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** There is a serious question whether Congress may extend fourteenth amendment rights to beings not traditionally thought of as persons. This aspect of Section 1 differentiates it from the statute sustained in *Katzenbach v. Morgan*. Another difference is discussed below.

attends any increase in the fetus' rights. Resolution of the abortion issue without such consideration could never be satisfactory. It is with good reason that the Supreme Court has not felt bound by extraneous utterances such as those in Roe.

The interpretation of Section 1 offered here should not be viewed as a veiled effort to frustrate the will of Congress. If Congress wishes to attempt to overturn the actual holding in Roe v. Wade, there is no legitimate reason for its failure expressly to do so. In the past, disagreement with Supreme Court decisions has led Congress to take just such direct action. For example, to the extent Congress took issue with the Supreme Court's upholding of literacy tests in Lassiter v. Northampton County Board of Elections, Congress did not resort to any indirect, ambiguous measure which left room for doubt about what Congress wished to accomplish. It did not, for example, merely declare that literacy tests have undesirable effects and then expect the Supreme Court to reverse itself. Given prior instances of Congress' unequivocal action in response to Supreme Court decisions, there is little reason to read more into Section 1 than is contained in its express language.

Furthermore, longstanding Supreme Court practice requires an express statement from Congress to undermine important existing rights. For example, section 1983 contains language that permits a rational reader to conclude that in enacting section 1983 Congress meant to abrogate state sovereign immunity. Nevertheless, in Quern v. Jordan, 440 U.S. 332 (1979), the Court stated that it would need an express statement of abrogation before eliminating such an important right. Similarly, in Tenney v. Brandhove, 341 U.S. 367 (1951), and again despite the breadth of section 1983, the Court refused to limit the immunity from suit of state legislators without a more express statement from Congress. And in Davis v. Passman, 442 U.S. 228 (1979), the Court refused to construe the exclusion of members of Congress from the definition of "employer" in Title VII as an effort by Congress to deprive its employees of the right to be free of discriminatory employment practices. Whether the rights at issue are those of states, legislators, congressional employees, or pregnant women, the Court is reluctant to conclude that Congress wishes to contract those rights without an explicit statement from Congress. Given the Court's attitude in these matters, and Congress' knowledge of that attitude, the Court may regard nothing short of an express statement as an effort to abrogate a woman's right of privacy.

II. The Confrontational Interpretation of Section 1

Alternatively, the Court might interpret Section 1 as doing what it does not purport to do, addressing the ultimate issue in Roe, the extent to which states may outlaw abortions, rather than addressing the intermediate issue of the fetus' status as a person under the fourteenth amendment. In such a case, Section 1 would have to be viewed as contradicting Roe v. Wade, and the scope of Congress' power to do so under the fourteenth amendment would be an unavoidable issue.

I would feel presumptuous in attempting to articulate any general theory of Congress' power under the fourteenth amendment. This is, in some sense, "the" constitutional question of this half-century, one with respect to which there is no generally accepted consensus and one that may not be susceptible of a general answer. I do, however, have two observations about Congress' fourteenth amendment powers that are pertinent in assessing Section 1.

First, it is beyond doubt that Congress' power to legislate under the fourteenth amendment is subject to limits. For example, suppose that Congress, in exercising its fourteenth amendment powers, were to enact a provision declaring that de jure segregated school systems do not amount to a violation of the equal protection clause. Even if the legislation were accompanied by a strong factual showing as to the equality of segregated schools and the absence of psychological damage to minority children, it could not seriously be contended that the Supreme Court automatically should accept the declaration and findings and retract its decision in Brown v. Board of Education. Congress' power under the fourteenth amendment is at least subject to limitations contained in the Constitution, including, somewhat paradoxically, fourteenth amendment limitations. There is an unavoidable balance to be struck in such a case.

Thus, if Roe v. Wade amounts to a holding that a pregnant woman's privacy rights outweigh those of the fetus, a statute overturning that holding must be subjected to scrutiny in light of constitutional values, including a woman's right to privacy. Congress' fourteenth amendment power is not a magic wand that, when waved, eliminates all constitutional difficulties.

Second, one can assess Section 1 in light of the Supreme Court's most important precedent in this area, Katzenbach v. Morgan. Briefly stated, Morgan is so fundamentally different from any case likely to raise the constitutionality of Section 1 that Morgan should not be viewed as a direct precedent for sustaining Section 1.

Superficially, there is a resemblance between Morgan and a conceivable hypothetical case testing Section 1's constitutionality. In each instance Congress relies on its fourteenth amendment powers to modify Supreme Court decisions about the scope of the Constitution. Given the broad scope given Congress' power in Morgan, one might expect a similar result with respect to Congress' power to enact Section 1.

Yet only at a misleading level of generality does the parallel between *Morgan* and the Section 1 case exist. In more fundamental respects the cases differ. In *Morgan*, Congress' expansion of the content of the equal protection clause came at no individual's expense. Section 4(e)'s limitation on English literacy as a voting qualification merely assured the franchise to a group theretofore deprived of it. The only contraction of others' prerogatives resulted from the marginal dilution of other voters' voting power that accompanies any extension of the franchise.

In the Section 1 case, by contrast, Congress may accomplish the desired expansion of the fetus' rights only at the expense of the pregnant woman's choice, a choice *Roe v. Wade* suggests is of constitutional significance. In *Morgan*, this counterbalancing issue simply was not present. Similar reasoning would distinguish the Court's tangled pronouncements about Congress' fourteenth amendment power in *Oregon v. Mitchell* and about Congress' fifteenth amendment power in *City of Rome v. United States*, 446 U.S. 156 (1980).

Finally, the most disturbing feature of the second interpretation of Section 1 is that it may require resolution of an important constitutional question in the context of assessing what seems to be a legislative trick. The constitutional analysis submitted by supporters of Section 1 acknowledges that Congress' power to outlaw abortions is subject to a pregnant woman's right of privacy. It states, "if Congress enacted a federal criminal statute to prohibit abortion, its action would collide with the right to privacy." Cong. Rec. S.294 n.95 (January 19, 1981). Obviously, then, state statutes prohibiting abortion also must impinge upon the right of privacy. Yet under the second interpretation of Section 1, it seeks to assure that the right of privacy will not prevail in cases testing abortion laws. If limitations on access to abortions interfere with rights of privacy, it seems they must do so whether the limitations are direct, as in the case of a federal statute outlawing abortions, or indirect, as in the case of Section 1. Our system is not a very satisfactory one if an otherwise available constitutional right can be undermined so easily.

I hope this discussion is of assistance to your Subcommittee and appreciate your request for my views.

Sincerely yours,

Theodore Eisenberg
Professor of Law

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May 13, 1981

Senator Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

The enclosed Memorandum is in response to your letter of April 21, 1981, requesting my views as to the constitutionality of Section 2 of S. 158. Due to the Memorandum's length, I am taking the liberty of restating its conclusion:

> "Proposals to restrict federal court jurisdiction because of displeasure with court decisions are not frequent. To have such proposals taken seriously is more unusual. Enactment of such proposals is extremely rare. You and your colleagues may stand at a crossroads in American history. Section 2 shifts the controversy from one about abortion to one about the structure of government. Congress is not simply passing upon the right to an abortion but also on whether Americans shall continue to enjoy their centuries old right of effective access to federal court to vindicate their constitutional rights. If Section 2 passes and is sustained, then any Congress hostile to any other constitutional right may contract that right by a similar measure. One trembles at the prospect."

I hope the Memorandum is of assistence to your Subcommittee.

Sincerely yours,

Theodore Eisenberg
Professor of Law

Memorandum on the Constitutionality of Section 2 of S. 158

Theodore Eisenberg
Professor of Law, UCLA

Analysis of Section 2 of S. 158 depends in part on one's assessment of Section 1. If consitutional limitations on antiabortion statutes do not survive enactment of Section 1, then Section 2 is constitutional. If federal constitutional limitations on state restrictions on abortion survive enactment of Section 1, then Section 2 may exceed Congress' power to control the federal judiciary.

There are at least two sets of circumstances under which federal constitutional limitations on antiabortion laws would survive enactment of Section 1.[1] First, Section 1 may be interpreted, as suggested in my letter to Senator Baucus of April 28, 1981, in a manner that does not undermine Roe v. Wade. In that event, at least some residual right to obtain an abortion would continue to be guaranteed under the federal Constitution. Second, if Section 1 is interpreted as (a) attempting to overrule Roe v. Wade but (b) being beyond Congress' power, existing abortion rights would survive. Except where otherwise indicated, I assume for purposes of this Memorandum that abortion rights would survive enactment of Section 1.

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[1] Hereafter, I frequently refer to those federal constitutional limits on antiabortion laws that survive Section 1 as "abortion rights."

I. A Framework Within Which to Analyze Section 2

One of Section 2's principal difficulties is that it undermines an essential role of the federal judiciary. Perhaps above all else the framers intended the national judiciary to be able to hear and to do justice in all cases involving federal constitutional rights. At the time of the Constitutional Convention and the Judiciary Act of 1789, this function could be performed solely by the Supreme Court. But this function no longer can be performed solely by the Court. Therefore, to maintain an essential function of the national judiciary, litigants need access to lower federal courts. What follows in Part I of this Memorandum is an effort to support each of the steps of the preceding argument.[2] The principles developed in Part I are applied to S. 158 in Part II. Although Part II also considers other possible constitutional infirmities of Section 2, I assume others will develop these arguments in greater detail.

A. An Essential Role of the Federal Judiciary

The framers intended the national judiciary to be able to hear and to do justice in at least all cases involving federal constitutional rights. In the 1780's, not unlike today, "[c]ourts were thought of in part . . . as instruments for the protection of individuals." Two of the most influential delegates to the Constitutional Convention stressed the federal judiciary's role as a protector of citizens. At the Convention itself Gouverneur Morris stated that everyone had witnessed "excesses against personal liberty, private property and personal safety." In one of the Federalist Papers Hamilton emphasized that the courts must protect individuals from legislative tyranny:

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[2] Substantial portions of this Memorandum are taken from or based on Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974). Documentation for many of the statements and quotations contained herein may be found in that article at pp. 506-13, 521-23, 527-28, 515-16.

> Limitations on legislative authority can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

The state ratification debates also reflect the common assumption that the federal judiciary would be available to vindicate all federal rights. There was no suggestion that the national judiciary or Congress had the power to choose which constitutional rights would be vindicated. At the Virginia deliberations on the proposed constitution, Supreme Court jurisdiction was said to be intended "to prevent injustice by correcting the erroneous decisions of local subordinate tribunals . . . . " This can only mean being able to do justice in each individual case within the federal jurisdiction, even if by appellate review.

This emphasis on the national judiciary's role as vindicator of individual rights strongly suggests that the framers intended national tribunals to be able to hear each case within the federal judicial power. Hamilton is again instructive:

> The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons receive their original or final determination in the courts of the Union.

The early Supreme Court did in fact supply a final determination of those cases appealed to it, no matter how trivial the matter might appear from a national perspective.

In addition, the judiciary would be unable to check legislative abuses if its jurisdiction were limitable at the unfettered discretion of Congress. To assume that the framers desired both to control the legislature by means of the federal courts and to give the legislature a method for nullifying such control by a simple majority vote approving a jurisdictional statute is "to charge them with chasing their tails around a stump."

A compelling indication that the framers intended the federal judiciary to afford a forum at some level for all cases within its jurisdiction comes from an omission from Article III. Neither the final arrangement nor any of the five judiciary plans submitted to the Convention authorized federal courts to decline to hear a case. Discretionary review by the Supreme Court did not originate until 1925. The framers' failure to confer, or even consider conferring, discretionary review powers upon courts suggests that federal tribunals, including the Supreme Court, were thought capable of providing a forum in all cases within their jurisdiction.

Many Supreme Court cases and a large body of legal commentary implicitly support the view that each litigant ought to be able to have his day in federal court. When the Court denies access to a lower federal court forum, as in Younger v. Harris, 401 U.S. 37 (1971), Stone v. Powell, 428 U.S. 465 (1976) or Allen v. McCurry, 101 S.Ct. 411 (1980), the Court or commentators often remark that the litigants' federal constitutional rights are protected by their access to Supreme Court review. Unless one believes the availability of a federal forum to be relevant, there is no reason for these repeated (even if misleading) assurances. Indeed, one of the most disquieting features of these cases is that the promise of Supreme Court review upon which they rest is, for the vast majority of litigants, an illusion.

B. The Original Plan for Implementing That Essential Role

Accepting the national judiciary's role as a protector of federal rights, how was the new judiciary to fulfill that role? The right to appellate review by the Supreme Court would provide litigants with an opportunity to have their cases heard by a national tribunal. This faith in the availability of Supreme Court review was in evidence at the Constitutional Convention. Rutledge employed it as a rationale for not including any lower federal courts in the constitutional scheme. Luther Martin explained to his fellow Marylanders that he did not think that lower federal courts were necessary because, "by giving an appeal to the Supreme

Court of the United States, the general government would have sufficient check over [state] decisions and security for the enforcing of their laws . . . . " Undoubtedly the same confidence was a major factor in the acquiescence of some to the deletion of mandatory inferior tribunals at the Convention.

The expectation that there would be few federal cases supports the view that Supreme Court review was believed adequate to implement the role of the national judiciary. If there were to be few cases, the Supreme Court, by appellate review, would be capable of vindicating each litigant's federal rights. Roger Sherman, a delegate to the Convention from Connecticut, later wrote that "it is not probable that more than one citizen to a thousand will even have a cause that can come before a federal court." Alexander Hanson, a Maryland federalist, also felt that there would be few federal actions. Soon after the Convention, James Madison wrote to George Washington, "The great mass of suits in every State lie between Citizen & Citizen, and relate to matters not of federal cognizance." With but few exceptions the framers felt that the federal judicary, due to the consitutional limits on the subject matter of its jurisdiction, would peacefully coexist with state courts, handling only those few cases of federal concern.

Thus commentary contemporary with ratification of the Constitution suggests that the federal judiciary in some form was expected to be able to hear any litigant whose case was within the federal constitutional jurisdiction, either at trial or on appeal. The absence of any provision in the Constitution giving the federal courts discretionary jurisdiction reinforces this view. The mandatory federal forum may have been limited to appellate review but it was to be available in all cases.

Willingness to implement the federal judiciary's role through Supreme Court review was perfectly understandable at the time. Without question, the Supreme Court was then capable of providing a forum for all federal cases. Between 1789 and 1801 the Supreme Court disposed of fewer than 90 cases. During the first four terms of the Court, not a single case was argued. Since the Court's jurisdiction was not discretionary, any litigant whose case fell within the federal judicial power and who desired to have a federal forum hear his case could obtain such a forum.

C. The Current Inadequacy of the Original Plan and the Resulting Shift in Federal Courts' Roles

However content one might have been in 1789 to have the Supreme Court by itself fulfill the national judiciary's role, such an approach clearly will not work in today's world. Contrast the above figures for the Supreme Court's early terms with the status of a modern Court term. During the 1979 Term, the Supreme Court was asked to hear 4,781 cases, but disposed of only 278 on the merits, including 149 by full opinion. This increase in case load has had significant consequences for both the Supreme Court and the lower federal courts. The Supreme Court is no longer capable of providing a federal forum to hear the merits of every case involving a federal constitutional question.

As the federal caseload has grown the role of lower federal courts has undergone change. Today the lower federal courts are more than mere federal trial forums for cases falling within the Article III jurisdictional grant. First, in those instances where the Supreme Court makes a pronouncement of nation-wide impact regarding federal rights or interests, access to the lower courts is needed to enforce and apply it. Moreover, as Supreme Court review becomes more selective, the lower courts have become the primary vindicators of federal rights.

Cases which dramatically affect the legal system are by now commonplace. Cases such as Miranda v. Arizona and Gideon v. Wainwright affected and continue to affect an enormous number of cases. Outside the area of criminal procedure, the reapportionment and desegregation decisions have generated hundreds of lower court cases. If the burden of enforcing such important decisions and resolving all the subsidiary questions were left to Supreme Court review of state court decisions unsympathetic to the federal right, it is doubtful that the task could be performed. Judge Carl

McGowan has noted the increased latitude available to the Supreme Court in desegregation cases simply because litigants have access to the lower federal courts.

> The promulgation of those principles [announced in Brown v. Board of Education] would have provided an infinitely more daunting prospect in the absence of the machinery provided by the inferior federal courts. Their performance in the discharge of this difficult task has been less than even, but is it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges . . . . Certainly it would have been hard to have asked them to risk such an exposure with so few shields.

Similarly, the success of innovative Supreme Court action in other areas, such as reapportionment and criminal procedure, has rested in substantial part upon the support of the lower federal courts. Access to the lower federal courts is even more important where the Supreme Court chooses to remain silent. To a significant extent the contemporary guarantors of federal rights are not the nine Supreme Court Justices but the judges of the district courts and courts of appeals. The lower judges are not authorized to decline to hear a federal matter within their jurisdiction. Hundreds of important issues are determined with practical finality by lower federal judges. During the 1949 Term it was said that the Court failed to consider on the merits a number of cases "which raised the most vital constitutional problems that could be presented to any court in a democratic country." No doubt the same could be said of more recent terms.

Caseload increases have a related effect on the Supreme Court's theoretical role. The heavy use of the Justices' discretion to determine what few cases the Court will hear on the merits makes it impossible to maintain the fiction that every litigant may resort to the Court for vindication of his federal claim. The Court can no longer resolve all federal cases. The Court's role today, by necessity, is to service issues rather than to do justice for all litigants. Justice Frankfurter, before he served on the Court, wrote that the essential functions of the Supreme Court are "[to] resolve conflicts among coordinate appellate tribunals and to determine matters of national concern." Indeed, the Court's own rule governing grants of certiorari reveals a bias toward issues rather than litigants and their particular rights.

This shift in the Supreme Court's function has meant that it must decline to hear most cases. The modern Court has no qualms about refusing to decide a case or controversy even when it has jurisdiction to do so. It may prefer to hear a case in which a particular issue is presented in a "clean-cut" manner, on a more complete record, or simply under "more appropriate circumstances." Whatever one's opinion of such techniques, they illustrate the modern Court's understanding of its function.

II. Analysis of Section 2

What conclusions follow from these assertions about an essential role of the national judiciary? In particular, if the structure of our government depends in part upon access to lower federal courts in constitutional cases, is a measure like Section 2, which limits their jurisdiction in such cases, unconstitutional? Although I address this question below, I would first like to suggest why Section 2's technical constitutionality should not become the focal point of the debate.

A. The Metaconstitutional Argument Against S. 158

Congress probably has power to enact a broad range of measures adversely affecting the judiciary's ability to fulfill its role. Some such measures could not easily be found unconstitutional. Yet they would be so at odds with our governmental structure that, whether or not constitutional, they should never be enacted.

One important such measure was President Roosevelt's court-packing proposal. Congress always has had power to specify the number of Supreme Court Justices. In 1937, frustrated by Supreme Court decisions blocking the New Deal, President Roosevelt proposed a plan to expand the Court, thereby providing him with a substantial number of new appointments to the Court. In a stinging rebuke, the Senate Judiciary Committee rejected the plan.

> We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of the constitutional principle. [Under] the form of the Constitution it seeks to do that which is unconstitutional. [I]ts practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is--an interpretation to be changed with each change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America. (quoted in G. Gunther, Constitutional Law 152 (10th ed. 1980))

Whether or not the court-packing plan was constitutional, it was so at odds with the fundamental structure of our system as to be irresponsible. Similarly, a Senate upset with a president might simply refuse to give its approval to any presidential appointments, regardless of the nominee's qualifications. Even if the Constitution vests the Senate with the naked power to so refuse, no Senator sensitive to how our system is meant to work could adhere to such a course.

If Part I accurately describes an essential role of the federal judiciary, then Section 2 of S. 158 is as grave a threat to the intended structure of our government as either of the foregoing situations. Assuming some abortion rights survive enactment of Section 1 of S. 158, Section 2 deprives litigants of effective access to a federal forum for vindication of a constitutional right merely because Congress disapproves of that right. Short of open hostilities between the courts and Congress, there can be no greater assault by

Congress upon the intended functions of the national judiciary. And in light of the critical role of the lower courts in enforcing and implementing Supreme Court decisions, Section 2 is little less than a direct challenge to the principle of judicial review.

Furthermore, even if Part I misreads the federal judiciary's role, Section 2 would be a dangerous precedent. The nation has come to view the federal courts as the final arbiters of constitutional rights. The Supreme Court's unacceptable results have been and may continue to be corrected by constitutional amendments. The few legislative exceptions to this pattern of finality have been in the name of undoing massive prior discrimination. Section 2 seems to overturn all of this through what to the lay public must seem like little more than a legal trick. Such a technique cannot build confidence in our institutions.

The Constitution does not and cannot specify in detail every desirable limit on congressional action. Relations between Congress and the other branches of government are to a large degree left to the good-faith discretion of Congress. But that broad discretion does not mean that a conscientious member of Congress may ignore inherent, even if nonconstitutional, limitations on relations with the other branches of government.

B. The Constitutionality of Section 2[3]

In passing on the validity of any federal statute one must determine its natural or probable effect and measure that effect against constitutional requirements. A statute that fails to conform to those requirements must fall. The foregoing principle apples to jurisdictional statutes. For example, a jurisdictional statute prohibiting black plaintiffs from bringing actions in the lower federal courts would fall as a violation of equal protection. These simple-sounding principles are more easily stated than applied. Although I suggest below theories under which Section 2 could be deemed unconstitutional, each theory is in some sense speculative. The modern Court never has faced this precise problem.

1. Section 2's Abridgment of the Right of Access to a Federal Forum

A statute depriving both federal and state courts of jurisdiction to hear a claim has an obvious, drastic impact. Statutes that foreclose only lower federal court jurisdiction have more subtle but nevertheless serious substantive effects. Consider a statute like S. 158 that deprives lower federal courts, but not state courts, of jurisdiction to hear a class of cases. The provision cannot be justified, as some might claim, on the ground that inferior federal jurisdiction is not necessary to vindicate federal rights because of the availability of Supreme Court review of state court decisions. No litigant has any assurance that the Court even will agree to hear his case. And, in the aggregate, litigants with federal claims, even constitutional claims, have absolute assurance that the Court will not hear each of their cases.

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[3] In discussing the constitutionality of Section 2, and in what follows, I refrain from a detailed analysis of case law in this area. There are two reasons for this. First, the sparse precedents do not provide sure guidance. Second, my analysis of the existing precedents is available at 83 Yale L.J. at 523-30. To the extent that precedent is viewed as relevant to this matter, my previous analysis supports the conclusions in this Memorandum.

It is not enough to say that state courts might perform well in abortion cases or that the Supreme Court might grant certiorari or that the lower federal courts might not be up to the task of protecting federal rights. These results may all occur with some frequency. The crux of the argument is independent of state court performance. The framers undoubtedly realized that state courts often would suffice, but they chose to rely on independent and life-tenured federal judges for the vindication of federal rights. They knew that in some places, at some times, pressures are brought to bear on state courts that cannot be brought to bear on federal courts.

History has not proven them wrong. One is reminded of recent efforts in California to recall or to prevent reelection of state Supreme Court justices because of disagreement with their decisions. The state trial judge in the Los Angeles school desegregation case was the subject of a recall movement. The efforts failed but they display the continuing pressures state judges must face. Some might argue that such popular pressure on courts is desirable. But with respect to federal constitutional rights, at least, our system was meant to offer litigants life-tenured, independent judges. There is a difference. Whether or not the framers' conclusion was correct, the factors that support their position have not disappeared.

2. Section 2 As Abridging Abortion Rights

The Supreme Court's inability to review each case suggests a second potentially unconstitutional effect of S. 158, an effect going beyond the availability of a federal forum. To an individual whose federal claim is rejected by state courts and who fails to obtain Supreme Court review, the effect of a federal jurisdictional withdrawal may be indistinguishable from that of a substantive statute foreclosing his claim. Technical niceties could be employed to distinguish the two kinds of laws. Jurisdictional statutes are theoretically unrelated to primary behavior; they impose no direct duties or penalties. The fact that a law appears in the jurisdictional section of the United States Code, however, does not mean that it lacks substantive impact. Thus, where state courts do not vindicate constitutional rights, the effect of a federal jurisdictional limitation on an individual denied Supreme Court review is strikingly close to a substantive law limitation. Any substantive statute with such effects on the vindication of federal constitutional rights would be struck down. Jurisdictional statutes should receive similar scrutiny. If they have unconstitutional substantive effects, they are themselves unconstitutional.

3. Discrimination Against Abortion Rights

Section 2 singles out one class of constitutional rights, abortion rights, for less protection than Congress affords all other constitutional rights. This discriminatory treatment suggests two overlapping bases for arguing that Section 2 is unconstitutional.

First, it is possible to argue that Section 2 should fall because it is motivated by hostility to an established constitutional right. Few problems of constitutional theory, however, have proved more difficult than deciding when a statute motivated by unconstitutional considerations should be invalidated. The Supreme Court's pronouncements in this area are hopelessly confused. They establish only that certain classes of first and fourteenth amendment rights may be protectable though motive-centered inquiries. They do not render unconstitutional all laws enacted to overturn constitutionally-based Supreme Court decisions or even all laws enacted with an unconstitutional motive.

There is one possible view under which Section 2 would fall for motive-related reasons. The Court's confusion in the motive field may reflect not doubt about whether motive ever should provide a basis for invalidating a statute but when motive should provide such a basis. It is possible that the Court declares motive to be irrelevant as a way of expressing doubt about whether an unconsitutional motive exists in a particular case. See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L. Rev. 152-55 (1977). If that is an explanation of the Court's hesitancy to use motive with respect to all constitutional rights, S. 158 may be subjected to motive scrutiny because there can be little doubt about the motives behind it. It is a frank effort to eliminate the rights found to exist in Roe v. Wade. And the motive underlying the effort, hostility to abortion rights, may well be viewed as unconstitutional.

Second, regardless of the motives underlying Section 2, it discriminates on its face against one class of litigants, those seeking to vindicate abortion rights. This raises the question whether Section 2 violates the principles of equal protection made applicable to federal legislation by the fifth amendment.

Under existing equal protection doctrine, Section 2 possesses neither of the characteristics that lead to virtually automatic invalidation of a challenged provision. That is, it neither affects a known fundamental right nor contains a suspect classification. Abortion rights have yet to be declared fundamental and discrimination among constitutional rights has yet to be declared a suspect classification. Nevertheless, abortion rights are closely related to rights of procreation and familial relations that are viewed as fundamental. The status of abortion rights for purposes of equal protection analysis must therefore be regarded as unsettled. It also is possible that Section 2 will be found to fall into a category of statutes for which a substantial though not necessarily compelling governmental interest must be found. In that event as well, it is difficult to predict the results of the Court's analysis.

There is one other common mode of analysis under equal protection doctrine. All statutory classifications must be rationally related to a permissible purpose. If Section 2's evident purpose, the contraction of abortion rights, is viewed as impermissible, Section 2 may be one of those extremely rare laws that falls for want of a rational relation to a permissible purpose. It is possible, however, to state Section 2's purposes more sympathetically than the evil-sounding purpose "to contract a constitutional right." One could characterize Section 2 not as an effort to contract abortion rights, but rather as an effort to protect fetuses. Such a purpose hardly sounds like a basis for upsetting a statute and its acceptance as S. 158's purpose would undermine the motive-based argument against S. 158 as well as the straightforward equal protection argument. If, however, one accepts the natural, inexorable linkage between an increase in fetal rights and a decrease in those of women, a desire to protect fetuses may have to be viewed as the functional equivalent of a desire to contract the rights of pregnant women.

The conclusion that Section 2 may violate constitutional principles does not necessarily lead to the conclusion that courts would grant any particular relief from its operation. Serious problems of enforcement and interbranch relations attend any judicial decree in this area. That a constitutional right may not be readily amenable to judicial enforcement, however, does not deprive the right of its status. It becomes all the more important in such cases for Congress to be sensitive to constitutional values.

C. Article III Does not Confer Unlimited Discretion Upon Congress to Enact Jurisdictional Provisions

Nothing in the Constitution undermines the case against the jurisdictional limitations contained in S. 158. Article III, the constitutional provision that comes closest to speaking to Congress' power to control lower federal court jurisdiction, states:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime jurisdiction;--to Controversies to

> which the United States shall be a Party;--
> to Controversies between two or more States;--
> between a State and Citizens of another State;--
> between Citizens of different States;--between
> Citizens of the same State claiming Lands under
> Grants of different States, and between a State,
> or the Citizens thereof, and foreign States,
> Citizens or Subjects.

One reading of Article III is that Congress has discretion to ordain and establish lower federal courts. Given that power, Congress at least generally must be able to choose the cases in which lower federal courts have jurisdiction. Do these statements translate into a constitutional argument supporting Section 2?

There are two reasons for believing that they do not. First, in light of what has been shown to be the central role of the lower federal courts in fulfilling the role of the national judiciary, the previous paragraph's argument is seriously incomplete. A more persuasive interpretation of Article III is that Congress was granted initial discretion to establish lower federal courts because in 1789 there was no clear need for such courts to fulfill the role of the federal judiciary. Because the framers in 1789 did not foresee the future explosion of federal constitutional rights, there was no need to command Congress to establish lower federal courts. This is why Article III reads as permissively as it does. But the unwritten assumption underlying Article III was that federal courts were to be available in each case to vindicate federal rights. When that assumption became unfulfillable without lower federal courts, Congress, to be consistent with the original plan, became obligated to create such courts or to devise other effective means to protect consitutional rights. Under such a view one cannot derive plenary congressional control over jurisdiction from the language of Article III.

Second, whatever guidance one derives from the text of Article III with respect to Congress' power to create lower federal courts (and not all agree that the text should be so read), Article III provides no express guidance with respect to Congress' control over their jurisdiction. In light of the fact that the framers expected Congress to create lower federal courts, that Congress did so, and that their existence spans the nation's existence, it seems particularly unrealistic to derive any additional control over the courts from some theoretical power to abolish them. In addition, constitutional infirmities that stem from the discriminatory aspects of Section 2 do not depend on whether Congress has plenary control of lower court jurisdiction. They depend only on finding the Constitution applicable to jurisdictional statutes.

Nevertheless, it seems clear that in general Congress must have the power to control lower federal court jurisdiction. There simply is no rational alternative. Can one articulate principles under which Congress has general control over jurisdiction without having authority to withdraw constitutional cases in general or the cases embraced by Section 2 in particular? The answer is yes.

III. Congress' Power to Control Jurisdiction and Remedies

The conclusion that lower federal courts are essential to fulfilling the role of the national judiciary, and that S. 158 may therefore be unconstitutional, does not mean that any effort by Congress to control jurisdiction is unconstitutional. For even though federal courts were intended to vindicate federal rights, Congress has a substantial role to play in creating, refining or restricting federal rights.

In particular, Congress may enact jurisdictional laws that accomplish what it could have accomplished by means of a substantive rule. That is, it may enact any jurisdictional statute that does not prevent vindication of a constitutional right. In cases in which Congress may constitutionally prescribe a rule of decision, no federal right that could be vindicated under a constitutional claim is excluded from the federal courts by the withdrawal of jurisdiction. Thus, if no abortion rights survive enactment of Section 1 of S. 158, Section 2's curtailment of jurisdiction is constitutional.

In addition, because Section 2 does not completely remove lower federal court jurisdiction to hear abortion cases, the question remains whether the federal jurisdiction available under Section 2 is sufficient to vindicate abortion rights. Unless one of the remedies provided by Section 2 sufficiently protects abortion rights, Section 2 remains unconstitutional despite some residual federal jurisdiction to hear abortion cases. Section 2 does not foreclose inferior federal court jurisdiction (1) to hear damage actions against officials who enforce unconstitutional antiabortion laws, or (2) to grant federal habeas corpus relief to those prosecuted under such laws. It is therefore necessary to decide whether either form of relief adequately protects abortion rights.

Neither remedy seems a sufficient mechanism through which to vindicate abortion rights. An antiabortion law has two effects. In some cases, it discourages a woman from seeking (or a physician from performing) an abortion. In other cases it imposes criminal penalties on women who obtain (or physicians who perform) abortions. As to those discouraged from seeking abortions by an unconstitutional antiabortion law, neither habeas corpus nor damages is an effective remedy. Relief from criminal liability is no consolation for those who obey an unconstitutional law, with a resulting unwanted birth. Damages at best are a crude form of compensation for an unwanted child. This truly is an area in which there is no adequate remedy at law.

The basic problem with both remedies is that they are retrospective in nature. They only function after the fact. Because of the irreversible nature of the birth process, abortion may be an area in which prospective relief, such as the declaratory and injunctive relief banned by Section 2, is the only effective relief.[4] The remedial rule here simply cannot require, as it does in the case of most taxes, initial obedience to the law followed by litigation. The later litigation too often will be too late. S. 158 seems to attempt to remove the only effective relief.

There is one other important class of jurisdictional statutes that may be within Congress' power. One should not jump to the conclusion that Congress must vest lower federal courts to hear all constitutional cases. An overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could in fact undermine the judiciary. A number of factors suggest the necessity for line-drawing. First, the expense of such a system might make it impracticable. Second, a large increase in the caseload would inevitably mean an increase in the number of judges and a decrease in the prestige attached to being a federal judge. Many commentators have stated that such prestige is needed if the federal bench is to continue to attract qualified lawyers, especially in areas where private practice is more lucrative. "Any deterioration in the quality of the district judges individually or of their performance collectively would destroy the very values the federal court system is meant to attain."

Thus Congress needs some authority to limit federal jurisdiction. The authority to curtail, however, is limited by its origins. It should not be used to restrict jurisdiction over narrowly defined classes of cases, such as those covered by Section 2, that pose little threat to efficiency; such selective curtailments would bear no rational relationship to the end sought, namely preservation of the quality of federal justice. The power to curtail is limited to prudent steps which help avoid case overloads. In fact, Congress' control of lower federal court jurisdiction has tracked the principles here enumerated. Any Congress enacting legislation not within these guidelines is not only risking a constitutional confrontation but also is breaking with the mainstream of its own traditions.

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[4] I do not address the question whether Section 2 prohibits other forms of prospective relief.

IV. Conclusion

Proposals to restrict federal court jurisdiction because of displeasure with court decisions are not infrequent. To have such proposals taken seriously is more unusual. Enactment of such proposals is extremely rare. You and your colleagues may stand at a crossroads in American history. Section 2 shifts the controversy from one about abortion to one about the structure of government. Congress is not simply passing upon the right to an abortion but also on whether Americans shall continue to enjoy their centuries old right of effective access to federal court to vindicate their constitutional rights. If Section 2 passes and is sustained, then any Congress hostile to any other constitutional right may contract that right by a similar measure. One trembles at the prospect.

May 12, 1981

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

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April 17, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

My feelings on S.158 are summarized in the attached article I did for the New York Times. Thank you for your interest.

Very truly yours,

John Hart Ely

JHE:sm
enc.

NEW YORK TIMES, TUESDAY, MARCH 17, 1981 A17

CONSTITUTION

Anita Siegel

Let There Be Life

By John Hart Ely and Laurence H. Tribe

CAMBRIDGE, Mass. — Sometimes it's hard to keep up. First it was life created in a test tube. Then patented life forms. And now we're told that all Congress has to do is pass a statute redefining "life" — by declaring fetuses to be "persons" from the moment of conception — and, presto, Roe v. Wade, the United States Supreme Court's 1973 decision preventing legislative interference with abortions until late pregnancy will disappear. No muss, no fuss, and, most important, no struggle for all the votes it would take to amend the Constitution the old-fashioned way.

The two of us have been on opposite sides of the debate over the constitutional legitimacy of Roe virtually since it was decided. But we have no trouble at all agreeing that this formula for overturning it is badly misguided. It won't work, and it's a good thing it won't.

Even if it were offered in the form of a constitutional amendment, it would be at best an unpredictable vehicle for overruling Roe. If fetuses really are to be regarded as persons from the moment of conception, that would seem to require states to punish rape victims who get abortions as murderers and the druggists who provide them morning-after pills as accomplices to murder. If, on the other hand (as certainly seems likely) the statute's proponents assure us that they don't mean *that* — that some distinctions between the extinction of fetal life and the extinction of other life can still be drawn — it could then become at least arguable that the goal of overruling Roe had not in fact been realized.

Let's suppose, though, that the Supreme Court would uphold a ban on abortion on the strength of a "fetal life" amendment to the Constitution. It doesn't follow that a mere act of Congress could accomplish the same result. The point of Roe v. Wade was not that the Supreme Court had found little "scientific" information about when life began or what a fetus was, but rather that the Government, merely "by adopting one theory of life," could not "override the rights of the pregnant woman." For Congress to proclaim the theory that a fetus is a person from the very begining would leave this constitutional calculus unchanged. It was a question of rights, not an issue of biology or a matter of definition, that Roe resolved.

Congressional power to rescue an otherwise unconstitutional law by the expedient of redefining the terms of the 14th Amendment would have dizzying implications well beyond the abortion controversy.

Should we make it as easy for Government officials to sue for libel as it was before The New York Times v. Sullivan, which barred damages for defamation of public officials in the absence of deliberate or reckless falsehood? That's simple enough: Congress need only announce that one's "liberty" of reputation demands that any publisher of libelous matter about an official be strictly liable for every falsehood. How about bringing back the racially restrictive convenants that were common before the Supreme Court in 1948 held them to be unenforceable? No problem. Just have Congress define judicial refusal to enforce racial restrictions on real-estate sales as a "deprivation of property." Yearn for the halcyon days when coerced confessions were admissible as evidence? Easy. Congress proclaims that from here on releasing any defendant on the ground that his rights were violated will be deemed to deprive all members of the public of their "liberty" from fear.

Indeed, why not skip all the bother and just let Congress redefine "due process of law" to include "any law Congress or a state legislature approves." It hardly matters — once Congress can defeat liberty by definitional fiat. Reducing the Constitution to whatever those in power want it to mean is an awfully high price to pay for making Roe disappear. We're all lucky — supporters and opponents of Roe alike — that such a gambit won't work.

Senator Jesse A. Helms wasn't conceived yesterday, and his constitutional advisers undoubtedly have explained to him why an attempt to overrule Roe v. Wade by statute must fail. Obviously, the idea is to score points with the "pro-life" constituency at the expense of the courts, which, as the senator well knows, will have no choice but to strike the statute down. When Roe was decided, many screamed — including one of us (Mr. Ely) — that the Court was playing politics. With treatment like this at the hands of the Congress, what else can we really expect?

John Hart Ely and Laurence H. Tribe both teach constitutional law at Harvard Law School.

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THOMAS I. EMERSON

May 1, 1981

Hon. Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in reply to your letter requesting my opinion as to the validity of Section 1 of S.158, a bill to "provide that human life shall be deemed to exist from conception." The purpose of the bill is to overturn the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973). In my judgment the bill is plainly unconstitutional and would be so held by the Supreme Court.

S.158 seeks to overrule the Supreme Court and change present constitutional law, without following the procedure for amendment of the Constitution under Article V, by making two "findings of fact" and two declarations of law. The first "finding" is that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception" and the resulting declaration of law is that, "for the purpose of enforcing the obligation of the States under the fourteenth amendment... human life shall be deemed to exist from conception." The second "finding" is that "the fourteenth amendment... was intended to protect all human beings," and the ensuing declaration of law is that the term "person" in the Fourteenth Amendment "shall include all human life" as defined above.

This attempt to amend the Constitution by majority vote of the legislature fails for several reasons. The so-called finding of fact that "human life exists from conception" is not a finding of fact at all, but a statement of religious or philosophic conviction, and is irrelevant to any constitutional issue. The declaration that the term "person" in the Fourteenth Amendment includes "all human life," born or unborn, constitutes an interpretation of the Constitution upon which the Supreme Court and not Congress makes the final decision. Efforts to circumvent Roe v. Wade through the device of making legislative findings concerning when "human life begins" have been consistently rejected by the courts in a series of cases since Roe v. Wade. Finally, the argument that Section 5 of the Fourteenth Amendment, authorizing Congress to "enforce... the provisions" of the Amendment, empowers Congress to change the basic meaning of those provisions has no support in our constitutional structure.

I. The So-Called Finding of Fact That "Human Life Exists From Conception" Is Not a Finding of Fact At All But a Statement of Religious or Philosophical Conviction and Is Irrelevant to Any Constitutional Issue

The premise of S.158 is that "human life," or more precisely a "human being," begins at conception. This "human life" is, according to the theory of the bill, endowed with the attributes of a human person, possessing a soul or at least entitled to the special status accorded human beings in our society. Without this premise the legislation would fall, for it would have to protect equally all forms of life, including animal and vegetable.

This basic premise does not rest upon any judgment that is subject to objective evaluation. It is not in any sense empirical or scientific. All that empirical judgment teaches us is that "life" exists in numerous forms, including each individual cell, some of which have the genetic potential for becoming human beings under some circumstances. But at what precise point this biological form of life actually becomes a "human being," or when that "human being" is created, is a theological or philosophical decision. It rests upon faith, or religious dogma, or a fundamental value at the basis of a philosophic system. For most of us it is a religious judgment. And this is true whether we support or oppose anti-abortion legislation.

There are, of course, many different views as to when human life is created. Some groups hold to the position that there is human life in each sperm and in each egg, and therefore that contraception destroys life. Others believe that human life begins at conception, either when the sperm first enters the egg or later when it remains there. Others assert that human life begins when the fetus makes its first movement, at the time of quickening. Others place the time at the point when the brain begins to function; still others when the fetus can live outside the womb. Over the centuries most people have probably thought human life to begin at the moment of birth. There are some who believe that life is never created, but merely passed on from prior generations. All of these various positions are based not on empirically verifiable data, but upon faith, dogma, or deeply held philosophical constructs. Hence any attempt to determine such an issue by making legislative findings of fact is wholly wide of the mark.

In any event the question of when "human life begins" is irrelevant to the constitutional issues raised by S.158. This is apparent from an analysis of Roe v. Wade, which sets forth the existing constitutional law upon the subject. The rationale of that decision is summarized in the following propositions:

(1) The constitutional "right of privacy" encompasses "a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

(2) This right "is not unqualified and must be considered against important state interests in regulation". 410 U.S. at 154. Since the right of privacy is a "fundamental" right, however, only a state interest that is "compelling" is sufficient to overcome the right of privacy. 410 U.S. at 155.

(3) The state interests involved are (a) the health of the mother and (b) protection of "potential human life." 410 U.S. at 162, 163.

(4) In weighing these interests, two matters are of crucial importance:

> (a) the fetus is not a "person" within the meaning of the Fourteenth Amendment. 410 U.S. at 156-162.
>
> (b) "We need not resolve the difficult question of when [human] life begins." 410 U.S. at 159. Whatever "theory of life" a State accepts, the State's interest which must be weighed against the individual's interest in privacy is the "interest in protecting the potentiality of human life." 410 U.S. at 162.

(5) With respect to the state's interest in the health of the mother, "the 'compelling' point ... is at approximately the end of the first trimester."

410 U.S. at 163. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability", i.e. the "capability of meaningful life outside the mother's womb." 410 U.S. at 164.

The Supreme Court therefore concluded:

> "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rightsof the pregnant woman that are at stake." 410 U.S. at 162.

It is starkly clear from this recital that the findings and declarations incorporated in S.158 are wholly incapable of altering the constitutional protections enunciated in Roe v. Wade.

Stephen H, Galebach, in his article in The Human Life Review, argues that by refusing to decide when "human life begins" the Supreme Court left open the question whether "Fourteenth Amendment protection logically extends to unborn children;" that the reason for this omission on the part of the Court was because "the judiciary has no suitable evidentiary standards to determine an answer;" and that "the result of Roe v. Wade would have been entirely different ... if any branch of government had been able constitutionally to examine when life begins and to resolve the question in favor of unborn children." Mr. Galebach is in error on all counts. As the above extracts from the Supreme Court's decision demonstrate, the Court held that the question when "human life begins" is irrelevant to the interpretation of the Fourteenth Amendment; that the State interest involved is the protection of "potential human life", a very different concept; and that whatever "theory of life" is adopted would not change the constitutional right of a woman to decide "whether or not to terminate her pregnancy."

II. The Issue of Whether an Embryo or a Fetus Is a "Person" Within the Meaning of the Fourteenth Amendment Is a Constitutional Question Upon Which the Supreme Court, not Congress, Makes the Final Decision

The second main proposition of S.158 -- that Congress can change the Constitution by redefining the word "person" in the Fourteenth Amendment -- is equally fallacious. The question of who or what is a "person" within the meaning of the Fourteenth Amendment is plainly a question of constitutional interpretation. Thus it has been held that a corporation is a "person" protected by the Fourteenth Amendment. Under our constitutional system, unless we are to overrule Marbury v. Madison and nearly two centuries of constitutional precedent, issues of constitutional law are to be decided by the judicial, not the legislative, branch of government. Hence a Congressional finding or declaration that an embryo or a fetus is a "person" within the meaning of the Fourteenth Amendment cannot change existing law as enunciated by the Supreme Court.

Any other rule would mean an end to the whole constitutional structure of separation of powers. Surely Congress could not by majority vote overturn the Dartmouth College case, 4 Wheat. 518 (1819), by finding that a charter was not a "contract"; or overturn Goldberg v. Kelly, 397 U.S. 254 (1970), by finding that the right to welfare benefits was not "property"; or overturn Pierce v. Society of Sisters, 268 U.S. 510 (1925), by finding that the right of parents to send their children to private school was not a "liberty"; or overturn Brown v. Board of Education, 347 U.S. 483 (1954), by finding that black children were not "persons". If a Federal Constitution is to exist, these decisions must be made by the Supreme Court.

III. Efforts to Circumvent Roe v. Wade Through the Device of Making Legislative Findings Concerning When "Human Life Begins" Have Been Consistently Rejected by the Courts

In Abele v. Markle, prior to the Supreme Court's decision in Roe v. Wade, the Connecticut anti-abortion statute, a law of the traditional type, was held unconstitutional by a three judge court, Judge Clarie dissenting. 342 F. Supp. 800 (D. Conn. 1972). The Connecticut legislature then reenacted the statute, leaving the substantive provisions essentially unchanged, but adding the declaration: "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception." Public Act No. 1, May 1972, Special Session. Proceedings were immediately brought before the same three judge court to have this legislation declared unconstitutional. The new Connecticut statute, it will be noted, did not explicitly say that the embryo or fetus was a "person" within the meaning of the Fourteenth Amendment. But the basic declaration was precisely the same as in S.158, -- that human life begins at the moment of conception.

The three judge court, still prior to the Supreme Court's decision in Roe v. Wade, declared thatthe new Connecticut statute was also unconstitutional, Judge Clarie again dissenting. 351 F. Supp. 224 (D. Conn. 1972). The State of Connecticut immediately appealed this decision to the Supreme Court, at the same time filing a motion to expedite the appeal. In its Motion and Statement of Jurisdiction the State of Connecticut laid major emphasis upon the declaration in the statute that human life commenced at the time of conception:

> "The primary reason why this appeal merits plenary consideration by this Court is that this is believed to be the first case involving the constitutional issue of abortion wherein an evidentiary record has been made. The evidence unquivocally supports the legislative finding that human life commences from the time a child is conceived. Under these circumstances, a very grave constitutional question is raised when such a law is stricken on the basis given by the lower court." (p. 17).

The Supreme Court did not act upon the appeal in Abele v. Markle until after its decision in Roe v. Wade. On February 26, 1973, however, the Court remanded the case "for further consideration in light of Roe v. Wade" 410 U.S. 951. The State of Connecticut then filed a petition for rehearing of the remand order. In its petition Connecticut again rested its case primarily upon the argument that "[t]he evidence conclusively demonstrates that an unborn child is an alive, separate and distinct human being from the time the child is conceived." Petition for Rehearing, p. 2. The petition summarized this evidence at length and concluded:

> "WHEREFORE, for the reasons set forth above, as well as those contained in their jurisdictional statements, your Petitioners respectfully pray that this Court grant a rehearing of these cases on the grounds of the compelling interest of their state government in protecting the natural right to live." (p. 54).

On April 16, 1973, the Supreme Court denied Connecticut's petition for rehearing. 411 U.S. 940. The case was remanded to the three judge Court and on April 26 that Court held a further hearing. Connecticut reiterated the position it had taken before the Supreme Court. On the same day the three judge Court issued its decision, Judge Clarie no longer dissenting:

> "Further consideration of this case in light of Roe v. Wade, supra, requires the conclusion that Public Act No. 1 is unconstitutional." 369 F. Supp. 807.

Doe v. Israel involved a Rhode Island anti-abortion statute adopted after the Supreme Court decision in Roe v. Wade. Like S.158, the Rhode Island statute declared:

> ... in furtherance of the public policy of said state, human life and, in fact, a person within the language of the fourteenth amendment to the constitution of the United States, commences to exist at the instant of conception."

The District Court had no difficulty in holding the Rhode Island statute invalid, saying that the claim of constitutionality for the new statute was "frivolous" and "essentially fictitious". 358 F. Supp. 1193, 1199 (D.R.I. 1973). The Court went on:

> "It is sheer sophistry to argue as the defendant does that Roe v. Wade ... can be nullified by the simple device of a legislative declaration or presumptions contrary to the court's holding. Indeed it is a surprising attempt by one independent branch of government to invade and assume the role of the other." 358 F. Supp. at 1201-1202.

The State of Rhode Island then applied to the Court of Appeals for a stay pending appeal. That Court, addressing itself to the merits, denied the request for a stay, saying:

> "We regard plaintiffs' expectation of prevailing on the merits so clear that we see no purpose in discussing other issues sought to be raised by the defendant." 482 F.2d 156, 159 (1st Cir. 1973).

The Supreme Court denied a petition for certiorari. 416 U.S. 993 (1974).

Similar claims, resting on findings that "human life" begins at the moment of conception and that a fetus is a "person" within the Fourteenth Amendment, were made and rejected in Rodgers v. Danforth (Civ. Action No. 18360-2, W.D. Mo. May 18, 1973), affirmed 414 U.S. 1035 (1973), and Rosen v. Louisiana State Board of Medical Examiners, 380 F. Supp. 875 (E.D. La. 1974).

It is true that these cases involved State statutes, not a Federal statute. The constitutional issues decided, however, were essentially the same as those raised by S.158. In these cases the courts held that (1) a legislative finding that "human life begins" at the moment of conception is irrelevant to the constitutional issue, and (2) the question whether a fetus is a person within the meaning of the Fourteenth Amendment is a question of constitutional interpretation for the courts, not for a legislative body. The Supreme Court continually refused to review these decisions.

IV. The Argument That Section 5 of the Fourteenth Amendment Empowers Congress to Change the Meaning of that Amendment Has No Support in Our Constitutional Structure

In his article in The Human Life Review Mr. Galebach, except for a citation to Aberle v. Markle on another issue, does not mention the cases just discussed. He argues at length, however, that Section 5 of the Fourteenth Amendment authorizes Congress to overturn Roe v. Wade through the findings and declarations embodied in S.158. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." On its face it is clear that S.158 does not "enforce" the provisions of the Fourteenth Amendment but drastically alters them, and thereby deprives millions of citizens of rights to which the Supreme Court has held they are entitled. That Section 5 was intended to achieve any such result is inconceivable. Nevertheless, Mr. Galebach's contention will be briefly considered.

The first part of Mr. Galebach's argument is that if Congress decides that "human life exists from conception" then it "follows logically" that "unborn children" are "persons" within the meaning of the Fourteenth Amendment. But it does not "follow logically" that because a single cell is "human life," or more properly "potential human life," such cell is a "person" within the meaning of the Fourteenth Amendment. The Supreme Court has, of course, held otherwise. Indeed Mr. Galebach concedes that his position "collides with the Supreme Court's holding in Roe v. Wade" and hence "raises serious constitutional questions." He therefore moves on to his main contention, which is that Congress has power under Section 5 to "apply ... Fourteenth Amendment terms in ways that differ from and even contradict Supreme Court interpretations".

Mr. Galebach's position is fatally flawed. The power granted Congress in Section 5 is the power to "enforce", to implement, to provide remedies for, the rights protected by the Fourteenth Amendment, not to change or diminish those rights as they have been interpreted by the courts. The reason for including Section 5 in the Fourteenth Amendment is that the legislature performs a different function than the courts in securing the rights guaranteed by that amendment. The function of the courts is to state what the rights are and to give them effect through judicial procedures. The power of the courts to enforce the provisions of the Fourteenth Amendment is thus limited to the "self-executing" features of the Fourteenth Amendment. The legislature has wider powers of implementation. It can appropriate funds, establish police and prosecuting machinery, create administrative procedures, undertake comprehensive factfinding to probe the depths of the problem and seek the best solutions. In this sense it has powers that go beyond those of the courts, and the courts will respect those powers. But the legislature cannot reject, or "contradict," the Supreme Court's interpretation of the Fourteenth Amendment, much less take away constitutional rights the courts have held to exist.

Mr. Galebach consistently fails to make this crucial distinction between the powers of the courts and the powers of the legislature in the administration of the Fourteenth Amendment. He would give Congress power to "contradict" the Supreme Court. The outcome would be a revolution in our constitutional structure.

The cases cited by Mr. Galebach do not support his position. On the contrary they are fully consistent with the traditional view of the constitutional structure set forth above.

In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court upheld a provision of the Voting Rights Act of 1965 which abolished literacy tests in all States and counties where less than 50 per cent of the voting-age residents had voted in prior elections. Previously the Court, in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), had held that, while literacy tests could be employed in a discriminatory fashion, they did not in and of themselves necessarily violate the Equal Protection Clause of the Fourteenth Amendment or the right to vote guarantee of the Fifteenth Amendment. The Voting Rights Act thus substituted a general prohibition, in certain areas, for a case-by-case adjudication as to whether a literacy test had resulted in an abridgment of the right to vote. The Court ruled that, Congress having found that individual adjudication was "inadequate to combat widespread and persistent discrimination in voting," the new remedy was an "appropriate means of combatting the evil." *Oregon v. Mitchell*, 400 U.S. 112 (1970), upheld the suspension of literacy tests on a nation-wide basis, using the same reasoning. In neither case did the legislature "contradict" the ruling of the Supreme Court in the *Lassiter* case. Congress was operating within the framework of the Supreme Court's determination that literacy tests could violate the Fourteenth Amendment , and was simply supplying a more effective remedy than courts by themselves could provide.

Mr. Galebach's main reliance is on *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Here the Supreme Court dealt with Section 4(e) of the Voting Rights Act of 1965, which stipulated that no person who had successfully completed the sixth grade in a Puerto Rican school could be denied the right to vote in any election because of inability to read or write English. In a companion case the Court had refused to hold that the New York statute requiring literacy in English was a violation of the "self-executing" provisions of the Equal Protection Clause of the Fourteenth Amendment. Cardona v. Power, 384 U.S. 672 (1966). Nevertheless it upheld Section 4(e) under Section 5 of the Fourteenth Amendment. Justice Brennan, writing for the majority, placed primary reliance upon an analogy to the "necessary and proper clause." Section 4(e), he said, "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government -- both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement." 384 U.S. at 652. In other words, "enhanced political power" resulting from the right to vote "will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." 384 U.S. at 652. This theory is a purely remedial one and, while it recognizes the power of the legislature to implement the Fourteenth Amendment, does not recognize any Congressional power to reject or reinterpret the Supreme Court's decision as to the meaning of the Equal Protection Clause.

Justice Brennan then went on to state, as a second ground for the decision, a proposition that is somewhat more ambiguous. He argued that Congress, in its "general appraisal of literacy requirements for voting, ... to which it brought a specially informed legislative competence," might have had a basis for predicating a "judgment that the application of New York's [English literacy requirement] constituted an invidious discrimination in violation of the Equal Protection Clause." 384 U.S. at 655-6. While there is some basis for construing this language as recognizing a power in Congress to find a violation of the Equal Protection Clause where the Court had not, essentially Justice Brennan was simply saying that the enhanced factfinding capacity of Congress had unearthed a factual basis for discovering discrimination which was not apparent to the Court when it considered the New York statute by itself. Certainly it is not believable that Justice Brennan meant to overturn all prior constitutional history and hold that Section 5 of the Fourteenth Amendment empowered Congress to reject the Supreme Court's authority to determine what the Fourteenth Amendment legally meant.

In any event the language of Justice Brennan in Katzenbach v. Morgan can give no comfort to the proponents of S.158. Justice Brennan made it entirely clear that his views of the power of Congress under Section 5 did not authorize that body to abrogate the constitutional rights of individuals under the Fourteenth Amendment as previously secured to them by Supreme Court decisions. Using a footnote, apparently on the theory that the proposition was so obvious as not to require elaboration, he said:

> "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S. at 651.

Since S.158 would "abrogate" the constitutional rights of a large group of citizens, Justice Brennan's opinion in Katzenbach v. Morgan has no application here. Mr. Galebach asserts that S.158 "would exert a collateral effect on the right to privacy, but it would not abrogate or infringe that right as the Supreme Court has interpreted it." The statement is disingenuous. S.158 is intended to, and would, remove present Fourteenth Amendment protections against State infringements of the right of a woman to terminate a pregnancy.

Oregon v. Mitchell, discussed above, in addition to upholding the ban on literacy tests, dealt with provisions of the Voting Rights Act Amendments of 1970 which prohibited denial of the vote to citizens who had reached the age of 18. The Court, by a five to four vote in each case, upheld the statute as applied to Federal elections but found it invalid as applied to State elections. A majority of the Court thus ruled that Section 5 of the Fourteenth Amendment did not empower Congress to find that a denial of the right to vote to 18 year olds constituted a violation of the Equal Protection Clause. In a dissenting opinion, joined by two other justices, Justice Brennan argued that Congress could "undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists" and, if it found not, "to remove the discrimination by appropriate means." 400 U.S. at 248. It would seem clear that Justice Brennan was thinking in terms of a factual determination by Congress as to whether discrimination existed, not in terms of a legal determination of what forms of discrimination were prohibited by the Equal Protection Clause. Furthermore, Justice Brennan reiterated, again in a footnote, his previous statement that Section 5 "does not grant Congress power [to] enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'" 400 U.S. at 249.

Mr. Galebach relies heavily upon the recent decision of the Supreme Court in City of Rome v. United States, 100 S.Ct. 1548 (1980). At issue was the validity of a provision of the Voting Rights Act of 1965 which prohibited changes in the electoral structure of the city, without prior approval of the United States Attorney General, when the purpose or effect of the change would deny or abridge the right to vote on account of race or color. There was no evidence that the purpose of the change was to deny or abridge voting rights but there was evidence that such was the effect. The Court, assuming that the "self-executing" features of the Fifteenth Amendment would invalidate only purposeful discrimination, nevertheless held that the prohibition based upon effect was valid under Section 2 of the Fifteenth Amendment. (Section 2, like Section 5 of the Fourteenth Amendment, authorizes Congress to "enforce [the Amendment] by appropriate legislation").

The majority opinion of the Court in Rome was meticulously framed to make it clear that the statute did nothing more than implement the rights created by Section 1 of the Fifteenth Amendment. There was no suggestion that Section 2 authorized Congress to create new rights or alter existing rights under the Fifteenth Amendment. The core of the decision was stated as follows:

> "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. ... We find no reason, then, to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from 'undo[ing] or defeat[ing] the rights recently won by Negroes.'" 100 S.Ct. at 1562.

It is thus clear from Rome that the Supreme Court has no intention of straying from the principle that Section 5 of the Fourteenth Amendment grants only implementing, remedial, powers to the legislature, and was never intended to confer upon Congress initiating powers to make substantive changes in the basic rights secured by the Fourteenth Amendment.

Sincerely,

Thomas I. Emerson

YALE LAW SCHOOL
NEW HAVEN, CONNECTICUT 06520

1981 APR 30 AM 11:00

Owen M. Fiss

April 21, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

The question you posed requires an analysis of Katzenbach v. Morgan and in as much as I clerked for the author of that opinion at the time the case was decided, I do not feel at liberty to undertake that analysis. I therefore must decline your invitation and hope you understand my reluctance in doing so.

Sincerely,

Owen M Fiss

OMF/len

RUTGERS
THE STATE UNIVERSITY
OF NEW JERSEY

SCHOOL OF LAW • CAMDEN • FIFTH AND PENN STREETS • CAMDEN • NEW JERSEY 08102

May 13, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of April 13th, inviting me to submit my assessment of whether Congress has the constitutional authority under Section 5 of the 14th Amendment and other constitutional provisions to enact Section 1 of S.158, which defines human life and personhood (for purposes of the 14th Amendment Due Process Clause) to exist from conception. I have asked my colleague, Professor Rand E. Rosenblatt, also a professor of Constitutional Law at Rutgers, to join me in answering your question.

Professor Rosenblatt and I conclude that Congress does not have the constitutional authority to enact Section 1 of S.158. As you know, Section 5 of the 14th Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of this article," i.e. the other sections of the 14th Amendment. This grant of power has been consistently understood by the courts, and by Congress itself, to contain two types of limitations. First, the power granted by Section 5 is the power to enforce the other provisions of the 14th Amendment, the meaning of which has been defined primarily by the federal courts. While Congress does have an important role in creating new remedies for judicially-recognized constitutional violations, see Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), South Carolina v. Katzenbach, 383 U.S. 301 (1966), and in protecting the representative nature of the political process, see Katzenbach v. Morgan, 384 U.S. 641 (1966), it does not have the authority to enact a statute diminishing or infringing a fundamental constitutional right recognized by the federal courts. Such an infringement of constitutional rights recognized under the 14th Amendment could hardly be called an "enforcement" of the 14th Amendment, and hence is not authorized by the enforcement clause of Section 5. For example, after the Supreme Court ruled in Brown v. Board of Education, 347 U.S. 483 (1954), that racially segregated public schools were inherently unequal, Congress did not have the authority under the enforcement clause to declare that racial segregation did constitute equal treatment, or to authorize the states to establish racially segregated school systems. See Katzenbach v. Morgan, 384 U.S. 641, 651 n.10. This type of limitation on Congress' Section 5 enforcement power is sometimes referred to as an "internal" limit because it rests on interpretation of the meaning of "enforcement" within the context of the 14th Amendment itself. See L. Tribe, American Constitutional Law (1978) at pp. 268-271.

A second type of limit on Congress' Section 5 enforcement power may be termed an "external" limit, because it rests on provisions of the Constitution other than those of the 14th Amendment. For example, Congress clearly has broad powers under Section 5 to enforce the 14th Amendment's prohibition of racial discrimination. But despite these broad enforcement powers, Congress could not constitutionally prohibit speech that disparaged persons on racial grounds, except in very narrow and extreme circumstances where such speech was designed to, and would likely produce, imminent lawless action. The reason Congress could not prohibit racist speech is that such expression, however distasteful, is protected by the 1st Amendment's prohibition of laws "abridging the freedom of speech." In other words, Congressional action under the Section 5 enforcement clause must respect the other provisions of the Constitution, notably the Bill of Rights that is also designed to protect fundamental individual rights. See L. Tribe, American Constitutional Law (1978) at p.272.

Section 1 of S.158 violates both the internal and external limits on Congress' Section 5 enforcement powers. A Congressional declaration that human life begins at conception, and that the term "person" in the 14th Amendment's Due Process Clause includes all human life beginning at conception, flatly contradicts three holdings of the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). First, the Court held that the term "person" used in the 14th Amendment "does not include the unborn." 410 U.S. at 158. The Court reached this conclusion by examining the way the term "person" is used in the 14th Amendment and other provisions of the Constitution, and by examining the historical and contemporary treatment of abortion in state legislation. It is clear, both from the text of the Constitution, and from the numerous exceptions and lesser punishment for abortion than for homicide in typical state legislation (including exemption of the pregnant woman from any liability at all), that pre-natal life has not been considered part of the concept of legal personhood embodied in the 14th Amendment or elsewhere in American law. See 410 U.S. at 157-58, 138-41.

Second, the Supreme Court held in Roe that various provisions of the Constitution embody a fundamental right to personal privacy, and that this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. The sources of this right can be found in the concept of personal liberty embodied in the Due Process Clause of the 14th Amendment, and in other sections of the Constitution, such as the 9th Amendment's reservation of rights to the people, and in the 1st, 4th and 5th Amendments. See 410 U.S. at 152-53. In recognizing the fundamental nature of the woman's right to decide whether to terminate her pregnancy, the Court noted the profound consequences of coerced childbirth for a woman's health and life. See 410 U.S. at 153. The Court also noted that a declaration that the fetus is a "person" within the meaning of the 14th Amendment would demolish women's fundamental right to choose. See 410 U.S. at 156-57. By declaring the term "person" to include all life beginning at conception, Section 1 of S.158 thus flatly contradicts these two holdings of Roe v. Wade, and cannot under any plausible view of the enforcement clause be considered an "enforcement" of judicially-recognized rights.

The Supreme Court's Roe opinion also addressed the question of when, aside from the issue of legal personhood, human life begins. The Court noted the lack of consensus on this question among the major religions, philosophies, and scientific disciplines, and stated that "we need not resolve" this difficult issue. See 410 U.S. at 159-62. However, the Court did resolve a related question by holding that given the great diversity of views about when human life begins, the states could not adopt "one theory of life" (i.e. that human life begins at conception), and thereby "override the rights of the pregnant woman that are at stake." 410 U.S. at 162. Section 1 of S.158 flatly contradicts this holding, and therefore is not authorized by the enforcement clause embodied in Section 5.

In addition to violating the internal limits of the enforcement power, Section 1 of S.158 also transgresses the external limits by violating other provisions of the Constitution. As noted above, the pregnant woman's fundamental right of privacy against state-coerced childbirth is rooted not only in the 14th Amendment's concept of liberty, but also in 9th Amendment's reservation of rights to the people, the 5th Amendment's concept of liberty, and other sources of associational privacy embodied in the 1st and 4th Amendments. See 410 U.S. at 152-53; see also 410 U.S. at 209-18 (Douglas, J., concurring). By demolishing this fundamental right, Section 1 of S.158 violates these provisions as well. Such violations are not, and cannot be, authorized by the enforcement clause of Section 5.

When introducing S.158, Senator Helms had printed in the Congressional Record an article by Stephen H. Galebach attempting to justify enactment of S.158 under the Section 5 enforcement power. The crux of Mr. Galebach's argument is that the Supreme Court has often described Congress' Section 5 enforcement power (and its analogous enforcement power under Section 2 of the 15th Amendment) in broad terms. Almost all of the cases Mr. Galebach relies on, however, concern

Congressional action under the Voting Rights Act. The distinctive features of the voting context are: (1) that the Courts have repeatedly recognized the existence of voting discrimination on racial and ethnic grounds in violation of the 14th and 15th Amendments; and (2) that Congressional remedies for such violations, with few exceptions, do not affect other individual rights protected by the Constitution. On the contrary, almost all the voting rights cases involve Congressional prohibition of devices such as literacy tests and electoral districting that have been, and often continue to be, used with discriminatory purpose or effect. It can hardly be argued that state and local governments have a "constitutional right" to exclude minorities from voting, or to dilute their influence in the political process through redistricting and other structural devices. In this context, it is understandable why the Supreme Court has defined Congress' enforcement powers in broad terms.

Section 1 of S.158 raises very different issues from Voting Rights Act cases such as Katzenbach v. Morgan, supra, or City of Rome v. United States, 100 S.Ct. 1548 (1980). In those cases, there were no countervailing individual rights raised as limits to Congress' enforcement power. In the abortion context, the countervailing individual right is a fundamental one, explicitly recognized by the United States Supreme Court as superior to the very arguments now embodied in S.158. Nothing in the voting cases cited by Mr. Galebach supports the proposition that Congress can "enforce" the 14th Amendment by destroying one of the fundamental individual rights recognized under it.

The only recent example of a possible conflict between Congress' Section 5 enforcement power and individual constitutional rights is the "minority set-aside" included in the 1977 and 1978 Public Works Acts, and upheld by the Supreme Court in Fullilove v. Klutznick, 100 S.Ct. 2758 (1980). In requiring that 10 percent of the funds spent under the Act be allocated, where feasible, to "minority business enterprises," Congress was attempting to overcome the effects of long-standing economic discrimination against minorities, particularly in the construction industry. At the same time, the minority set-aside did impinge to some extent on the constitutional right of white sub-contractors to have their bids for government contracts considered without regard to race. In the light of this impact, the Supreme Court carefully examined the minority set-aside to ensure that it was "narrowly tailored" to remedy the effects of prior discrimination. 100 S.Ct. at 2776. The Court concluded that the use of race-conscious remedies was an established and necessary part of overcoming prior discrimination, and that the particular means chosen by Congress in this instance imposed only an "incidental" and "relatively light" burden on nonminority firms, many of whom, the Court noted, may have reaped competitive benefits from the long-standing exclusion of minority businesses. 100 S.Ct. at 2777-78.

In terms of consequences for individual constitutional rights, the contrast between the minority set-aside and S.158 is striking. In the first instance, Congress acted against a background of factual consensus regarding the exclusion of minority firms from government contracting, and provided a remedy distinctly limited to a small portion of one government program. In contrast, Section 1 of S.158 adopts "one theory of life" in the face of profound disagreements characteristic of traditional American religious and philosophical pluralism, and broadly sweeps away a fundamental individual right under the Constitution. The burden imposed by the bill on women is not, in the language of *Fullilove*, "light," nor is it "incidental" to some other, legitimate governmental goal. Nothing in *Fullilove* authorizes such consequences.

For the above reasons, we conclude that Congress does not have the authority under Section 5 of the 14th Amendment, or under other provisions of the Constitution, to enact Section 1 of S.158. On the contrary, enactment of this bill would impose a severe crisis on the nation's constitutional structure. We urge you and your colleagues in the Senate to oppose its enactment.

We would appreciate it if you would include this letter in the record of the Subcommittee's hearings. We would be glad to supply additional information or testimony if needed.

Sincerely,

Ann E Freedman (lec)

Ann E. Freedman
Associate Professor of Law

Rand E Rosenblatt lec

Rand E. Rosenblatt
Associate Professor of Law

AEF/RER:lec

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

April 24, 1981

The Honorable Max Baucus
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Baucus,

You were good enough to invite my views on the authority of Congress to enact Section 1 of S. 158. As you know, I have joined a number of other scholars in Constitutional Law in a brief statement expressing the opinion that Section 1 is beyond the power of Congress.

That statement might serve as a response to your invitation, but since the question relates to the power of Congress under Section 5 of the Fourteenth Amendment to define the rights protected under that Amendment, and since a decade ago I argued that Congress did possess the power to extend the franchise to 18-year-olds by way of enforcing the equal-protection guarantee, a fuller statement of my position may be appropriate.

In the case of the 18-year-old vote, only four Justices ultimately agreed that Congress had the requisite authority under Section 5 of the Fourteenth Amendment. The majority explained an earlier decision, giving broader scope to Congress to prescribe substantive classifications, as resting on the fact that it had involved a racial classification, as to which the authority of Congress, on historical grounds, was exceptionally broad. See Oregon v. Mitchell, 400 U.S. 112 (1970), distinguishing Katzenbach v. Morgan, 384 U.S. 641 (1966).

The Oregon decision might suffice to reject Section 1 of S. 158, which attempts to overcome the decision in Roe v. Wade, 410 U.S. 113 (1973), by re-defining "person" and "life" in the guarantee that no State shall deprive any person of life, liberty or property without due process of law. My position, however, does not rest on accepting the majority view in the Oregon case. In my judgment Section 1 of S. 158 is ineffectual even if one adheres to the more expansive view of Congress' authority taken by the minority of four Justices. A comparison of what was attempted in the Oregon case with what is attempted in the present bill will underscore the weakness of S. 158.

In the Oregon case Congress in effect found that 18-year-olds were no less politically informed and intelligent than 21-year-olds for purposes of voting -- a judgment that members of Congress were peculiarly qualified by experience and observation to make. Moreover, there had been no Supreme Court decision to the contrary. In the case of abortion, the present effort is to redefine constitutional terms, and to do so in a way that would abrogate rights declared by the Supreme Court to derive from the liberty guaranteed by the Fourteenth Amendment itself.

The decision in Roe v. Wade, whether one agrees with it or not, necessarily involved a unique relationship, the liberty and autonomy of the mother and the claims on behalf of the unborn foetus. How these opposing claims are to be resolved does not turn on scientific or popular definitions of life, but on a weighing of the interests to be protected. This was the Court's position, stated concisely: "We need not resolve the difficult question of when life begins." 410 U.S. at 159.

The implications of a legislative power to overturn Supreme Court decisions by re-defining constitutional terms are far-reaching indeed. Suppose, for example, that in the 1920s, after the Court decided that minimum-wage laws were a deprivation of liberty of contract, Congress by law declared that the liberty of the Fourteenth Amendment did not include freedom to enter into sub-standard wage agreements. Many would have welcomed the purpose but would not have essayed to propose it as a way of overcoming the decisions. Or suppose that in the 1940s, after the Court had overruled those decisions and upheld minimum-wage laws, Congress had enacted that the liberty of the Fourteenth Amendment did include the right to make wage agreements without restrictions. Would the most ardent advocates of the free market have espoused this as a way of restoring the constitutional doctrine of the 1920s?

The implications for our constitutional system far transcend in importance the issues in the abortion controversy. Constitutional change can occur, and often has occurred, through re-submission of an issue to the Court. The Court, as Justice Brandeis said, has frequently bowed to the lessons of experience and the force of better reasoning. On other occasions the route of constitutional amendment has been taken to supersede deeply unacceptable decisions. But always, and wisely, Congress has avoided the oblique obliteration of adjudicated constitutional rights by ordinary legislation.

With all good wishes,

Sincerely,

Paul Freund

Paul Freund

PF:pm

STANFORD LAW SCHOOL

1981 APR 23 PM 12:00

April 20, 1981

Senator Max Baucus
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20515

Dear Senator Baucus:

We have both received your request for comments on the constitutionality of S. 158. Since our views on both sections of the bill are very similar, we are responding jointly.

Section 1 declares that fetuses are human beings from the moment of conception. In our view, this goes beyond the power granted to Congress by Section 5 of the Fourteenth Amendment.

This provision of the bill is an attempt to override the Supreme Court's holding, in *Roe v. Wade*, that fetuses are not persons for Fourteenth *Amendment purposes*. Such a substantive departure from the Court's interpretation of the Amendment rests on the theory that Section 5 of the Amendment grants an "interpretive" power to Congress, a theory that is doubtful at best under the case law. As the "Galebach memorandum" recognizes, *Oregon v. Mitchell* left the very existence of any such *interpretive power in serious* question. But contrary to what that memorandum asserts, neither *Fullilove v. Klutznick* nor *City of Rome v. United States* did *anything to resolve that* doubt. *Both of these decisions were* based upon Congress' power to provide remedies beyond those independently exercised by the courts against *judicially recognized* constitutional wrongs -- in *Fullilove*, *against racial discrimination* in the award of public *contracts*; in *City of Rome*, against racially discriminatory electoral *gerrymandering*.

But, even under the broadest reading of *Katzenbach v. Morgan*, Congress' interpretive power can not *sustain Section* 1 of *S. 158*. The Court in both *Katzenbach v. Morgan* and *Oregon v. Mitchell* expressly denied the existence of congressional power to *cut back* on judicially declared Fourteenth Amendment rights under the guise of "enforcing" those rights. Section 1 of the bill would undermine the constitutonal right of women to free choice in procreational decisons, as established in *Roe v. Wade*.

We believe that Congress can properly substitute its own reasonable and good faith reading of the Fourteenth Amendment for that of the Court *so long as that reading does not undermine judicially declared individual rights. This limitation is essential if the role of the Court* as a relatively detached guardian of constitutional liberty, free from the pressures of constituency politics, is to be preserved.

If *Roe v. Wade* can be effectively overruled by congressional erection of the values held by its many opponents to the status of constitutional rights, none of the Court's sometimes unpopular decisions protecting minorities will be safe from similar legislative reversal. Any such result would be a serious departure from a constitutional order that has its roots in *Marbury v. Madison*.

Finally, Section 1 is seriously misleading in its declaration that "scientific evidence" supports the status of the fetus as a human being. The question of the full humanity of the fetus is not a scientific matter at all. It does not turn on the facts of embryology. It is rather an ultimate philosophical or religious question, as to which the Supreme Court has ruled that neither itself nor the state legislatures nor Congress can impose an authoritative answer. We are confident that your committee will not be misled into thinking that enactment of S. 158 can be justified on the basis that it merely substitutes Congress's *factual judgment* for that of the Court.

Section 2 of the bill deprives lower federal courts of jursidiction over actions challenging the constitutionality of state anti-abortion legislation. It is evident on the face of section 2, and from the context of the entire bill, that the provision is designed to curtail the enforcement of federal judicial decisions applying the Fourteenth Amendment to state anti-abortion legislation. Under these circumstances, we believe that section 2 is not a legitimate exercise of Congress' Article III authority to regulate the jurisdiction of federal courts.

Article III, section 1 grants Congress broad discretion to establish inferior federal courts and to define the scope of their jurisdiction. But even if Congress need not grant federal courts any jurisdiction to hear constitutional claims, *Congress may not restrict federal jurisdiction for the purpose of impeding the enforcement of judicial interpretations of the Constitution.*

Every constitutional grant of power to the Congress is limited to the purposes for which it was made. This self-evident principle was made explicit by Chief Justice Marshall in *McCulloch v. Maryland*. After establishing the breadth of the Congress' powers, Marshall cautioned:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of he land.

Although the Supreme Court has struck down various laws on the ground of "pretext," it has hesitated to strike down others. Its hesitation has not, however, reflected doubts about Marshall's underlying premise -- that congressional powers may only be exercised for the purposes for which they were delegated.

Rather, it is based on the difficulties and improprieties attending judicial inquiry into legislative motivation necessary to determine whether the exercise of power was a "pretext." This was the basis of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), in which the Court acquiesced in Congress' restriction of the Court's appellate jurisdiction in certain habeas corpus actions. Chief Justice Chase wrote: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

However appropriate judicial reluctance to inquire into Congress' motives may be, it provides no warrant for Congress refusing to inquire into its *own* motives in enacting a law. Indeed, the very fact that the judiciary is inhibited from inquiring whether a jurisdictional statute is a pretext for pursuing objectives not entrusted to Congress, imposes a special burden on Congress to monitor the constitutionality of its own action. See Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975).

The purpose of section 1 of Article III is to grant Congress the power to determine the need for inferior federal courts and the general scope of their jurisdiction. Neither the language of Article III, nor anything in the history surrounding its adoption, suggests that it was designed to give Congress the power to impede the enforcement of judicial interpretations of the Constitution.

The belief that the Supreme Court has ultimate authority to interpret the Constitution, however deeply ingrained in our history and tradition, is of course not incontrovertible. But even were Congress to determine that in some or all circumstances it has the ultimate authority to interpret the Constitution, we believe that to use a regulation of jurisdiction as a pretext for asserting its substantive disagreement with the Court's constitutional interpretations would be an abuse of the power delegated by Article III.

Sincerely,

Thomas C. Grey

Thomas C. Grey
Professor of Law

Paul Brest

Paul Brest
Professor of Law

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

1981 APR 20 PM 1: 10

April 16, 1981

Dear Senator Baucus,

I have your invitation to comment on S.158. Having recently responded to a similar invitation to comment on a similar Bill (H.R. 900), please allow me to quote from my previous response:

> "In my view, the proposed declaration would not be effective to achieve its apparent design: if adopted, a state abortion statute would face essentially the same constitutional obstacles as if Congress had not spoken.
>
> In Roe v. Wade the Supreme Court held that a state cannot interfere with a woman's right to have an abortion except at certain limited times and in certain limited circumstances. That determination by the Court in effect held that the woman's liberty outweighed any rights the foetus may have, or any interest the state may have in protecting the foetus. Congress, authorized to carry out the provisions of the Fourteenth Amendment, cannot deprive the woman of rights which she has under the Amendment by setting up new countervailing rights under it in the guise of interpreting the Amendment.
>
> I add that if Congress could impose this definition of "person" on the states, the consequences might be far-reaching and baneful in other respects. For example, it might result in states having to treat every accidental miscarriage as a form of homicide as well as a tort. It might give the foetus a "right to be born" with claims against parents, doctors, the state, strangers, who might interfere with it. It might vest property interests in every foetus, which the parents, others and the state itself could not modify.
>
> Congress should not enact H.R. 900."

Thank you for inviting this expression of my views.

Sincerely,

Louis Henkin

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

APR 9 1981

April 3, 1981

Dear Rep. Edwards,

I have your invitation to comment on the constitutionality of H.R. 900, the "Human Life Statute." In my view, the proposed declaration would not be effective to achieve its apparent design: if adopted, a state abortion statute would face essentially the same constitutional obstacles as if Congress had not spoken.

In Roe v. Wade the Supreme Court held that a state cannot interfere with a woman's right to have an abortion except at certain limited times and in certain limited circumstances. That determination by the court in effect held that the woman's liberty outweighed any rights the foetus may have, or any interest the state may have in protecting the foetus. Congress, authorized to carry out the provisions of the Fourteenth Amendment, cannot deprive the woman of rights which she has under the Amendment by setting up new countervailing rights under it in the guise of interpreting the Amendment.

I add that if Congress could impose this definition of "person" on the states, the consequences might be far-reaching and baneful in other respects. For example, it might result in states having to treat every accidental miscarriage as a form of homicide as well as a tort. It might give the foetus a "right to be born" with claims against parents, doctors, the state, strangers, who might interfere with it. It might vest property interests in every foetus, which the parents, others and the state itself could not modify.

Congress should not enact H.R. 900.

Sincerely,

Louis Henkin

Rep. Don Edwards
Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

RUTGERS
THE STATE UNIVERSITY
OF NEW JERSEY

[illegible] JUN 26 [illegible]

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June 22, 1981

Senator Max Baucus
United States Senate
Washington, D. C. 20510

Re: S. 158

Dear Senator Baucus:

I am writing in response to your inquiry concerning the constitutionality of S. 158. As a law school teacher of federal jurisdiction and constitutional advocacy, I have considered the question and am of the opinion that both sections of S. 158 are unconstitutional.

The first section of S. 158 is unconstitutional because it seeks to do by legislative action what can only be done by constitutional amendment: change the meaning of the due process clause of the fourteenth amendment. Roe v. Wade, 410 U.S. 113 (1973) held that the concept of person in the fourteenth amendment does not include a fetus. This is a matter of legal definition, not a question of fact to be addressed by Congress. The founding fathers established a procedure for amending the Constitution precisely because they wished to prevent a simple majority of legislators from changing the meaning of the Constitution whenever they chose. If Congress could change the meaning of the Constitution by majority vote, why have a written constitution?

Cases such as Katzenbach v. Morgan, 384 U.S. 641 (1966) and City of Rome v. United States, 446 U.S. 156 (1980), which construe the power of Congress to enforce the Civil War Amendments, provide no authority for S. 158. The power to enforce is entirely separate from the power to define. Exercising the power to enforce does not curtail any constitutional rights. Attempting to redefine constitutional rights, as S. 158 would do, directly restricts the constitutional right of women recognized in Roe v. Wade.

Section 2 of S. 158 is similarly faulty. It would violate equal protection because it would close the door of federal trial courts only to women seeking to exercise their fundamental right to decide whether to end their pregnancy. Although there is scholarly disagreement about the matter, we can concede for purposes of this discussion that Congress has the power to make "exceptions" to the jurisdiction of the District Courts. Congress is bound by the fifth amendment, however, and cannot make any exceptions that violate the equal protection concept that the fifth amendment contains. Section 2 of S. 158 violates equal protection because it trenches solely on the fundamental right to make decisions about whether to bear children but is not supported by any compelling government interest. Even if the right is not deemed fundamental, the restriction must fall because it is not rationally supported by any legitimate governmental interest. The only plausible reason for the restriction is to limit the ability of women to exercise their right, and that reason is no more legitimate than an outright prohibition on abortions. Unlike limitations on third trimester abortions, or limits on the purposes for which federal funds may be spent, this withdrawal of federal jurisdiction does not plausibly serve any other governmental interests. If this restriction were permissible, Congress could just as well exclude from federal court blacks who seek relief from segregated schools, but permit whites access in "reverse discrimination" cases, or could bar from federal court persons challenging voter residency requirements but permit federal declaratory actions by states seeking to uphold their laws. In each example, the only plausible purpose of barring access to federal courts is to control the outcome of the case, and that is beyond the power of Congress to do.

If I can be of any further assistance to you in considering S. 158, please don't hesitate to contact me.

Very truly yours,

Jonathan M Hyman

Jonathan M. Hyman
Associate Professor of Law

1981 MAY 18 AM 10 24

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8-17 Plymouth Drive
Fair Lawn, NJ 07410
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May 11, 1981

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am a third year student at the Yale Law School. I have been doing independent research for Professor Paul Gewirtz on the constitutionality of S.158. After receipt of your letter dated April 13, 1981, he suggested I communicate to you the results of my efforts. I concluded that S.158 is unconstitutional.

I should note that my research was conducted with an open mind. Moreover, to insure the correctness of my determination, I resolved all ambiguities in a manner most favorable to S.158.

Aware of the constraints of the Congressional setting, I have kept my paper short and readable, avoiding the lawyer's inclination to unnecessarily complicate matters and include too many citations.

I hope you find my analysis useful. Please do not hesitate to call or write me if you have any questions.

Sincerely,

Glen Arlen Kohl

Glen Arlen Kohl
Yale Law School
Class of '81

Enc.

THE CONSTITUTIONAL STATUS OF S.158

Glen Arlen Kohl
Yale Law School
Class of '81
May 8, 1981

I. INTRODUCTION

In Roe v. Wade 410 U.S. 113 (1973), the Supreme Court struck down a Texas law forbidding a woman to have an abortion unless her life was in danger. The Court held that the constitutional right to privacy included the right to choose to terminate one's pregnancy during the first trimester. 410 U.S. at 153. Since Roe v. Wade, abortion foes have proposed many schemes for circumventing the Supreme Court and outlawing abortion. One method suggested is to have Congress enact the following statute, S.158, authored by Senator Jesse Helms and Representative Henry Hyde.

> "SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.
>
> "The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.[1]
>
> "Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein.

This paper examines whether the law would pass constitutional muster and reaches the conclusion that it would not.

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[1] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. Const. amend. XIV

II. CONSTITUTIONALITY OF THE STATUTE

Roe v. Wade held that the word "person", as used in the Fourteenth Amendment does not include the unborn. 410 U.S. at 158. S.158 declares person does include fetuses. By enacting S.158, Congress attempts to overrule the Supreme Court's interpretation of the Constitution. But, as the analysis below reveals, this action is an unconstitutional encroachment on the Supreme Court's turf, in violation of the separation of powers doctrine first announced in Marbury v. Madison, 1 Cranch 137 (1803).

In Marbury, John Marshall declared: "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177. The Supreme Court discussed Marbury in the school desegregation case of Cooper v. Aaron, 358 U.S. 1 (1958):

> [Marbury v. Madison] declared that the basic principle that the federal judiciary is Supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and this Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown [v. Board of Education, 347 U.S. 483 (1954)] case is the Supreme Law of the land." Id. at 18.

The inescapable conclusion then, of Marbury and Cooper is that the Supreme Court's definition of person reigns supreme and S.158 is unconstitutional.

Allowing Congress to reinterpret the Fourteenth Amendment under its §5 powers at the expense of pregnant women's privacy rights would render Marbury a dead letter, fatally injuring our constitutional system as we know it.

> "Congress is subject to none of the institutional restraints imposed on judicial decisionmaking, it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourth of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure." Oregon v. Mitchell 400 U.S. 112, 205 (1970) (Harlan, J. concurring and dissenting).

The potential ramifications of a successful circumvention of the amendment process are frightening. Congress would be able to determine that "person" did not include Puerto Ricans or American Indians, thereby denying whole classes of people their constitutional rights. Congress could conceivably conduct an investigation into the psychological effects of segregation, similar to the one being conducted in support of S.158. Then, by declaring it had evidence that separate was equal, Congress would overrule Brown v. Board of Education of Topeka 347 U.S. 483 (1954). Helms and Hyde should be reminded that their interpretation of Congress' §5 powers would permit liberal as well as conservative amendments. If the Equal Rights Amendment advocates had employed the same tactics now being employed by the supporters of S.158, it would have been a safe bet that the two legislators would have been making all kinds of speeches about the sanctity of the judiciary's right to interpret the Constitution.

In light of S.158's patent unconstitutionality, it is legitimate to question the motives of Helms and Hyde. Harvard Law Professors John Ely and Laurence Tribe feel the legislators are pushing the bill only "to score points with the pro-life constituency at the expense of the courts." L. Tribe and J. Ely "Let There Be Life" New York Times, A17 (March 17, 1981). Yet, in a sense, the Court brought this kind of assault upon itself. In Katzenbach v. Morgan 384 U.S. 641 (1966), and several cases thereafter,[2] the Court has indicated that Congress has limited authority, under its §5 enforcement powers to investigate, prohibit, and remedy discrimination that it alone determines to be in violation of the Fourteenth Amendment. By permitting Congress to independently declare that certain conduct constitutes a violation of Fourteenth Amendment, the Courts are, in effect, allowing Congress to independently interpret the Constitution. The Katzenbach v. Morgan doctrine has received much criticism. The major complaint, not surprisingly, is its apparent inconsistency with Marbury. In any event, the Court should have realized, as Justice Harlan's dissent in Morgan warned, that Congress would attempt to force civil rights-threatening legislation through the apparent loophole it created in Marbury.[3] For the purposes of determining whether S.158 is unconstitutional, however, it is unnecessary to enter the debate over the validity of Katzenbach v. Morgan and its progeny. The analysis below reveals that even assuming the loophole is valid, S.158 does not meet the criteria for passing through it and therefore remains unconstitutional.

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[2] Oregon v. Mitchell, 400 U.S. 112 (1970) and Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[3] Some commentators feel Morgan does not infringe on Marbury v. Madison and that Congress can only use its §5 powers within the confines of Marbury v. Madison. See Cox, "The Role of Congress in Constitutional Adjudication", 40 U. Cin. L. Rev. 199, 247-261 (1970). Thus, since S.158 overrules Roe v. Wade, Marbury would render it unconstitutional. Nevertheless, construing Morgan as a loophole simplified analysis and resolves this ambiguity in favor of S.158.

The Loophole

In Katzenbach v. Morgan, the Supreme Court upheld §4(e) of the Voting Rights Act of 1965 which excused citizens who had completed at least the sixth grade in an accredited Puerto Rican school from New York's literacy requirement. One of the two theories upon which Justice Brennan, author of the majority opinion, based the decision[4] was that Congress could enact "appropriate legislation" under §5 to enforce the Fourteenth Amendment without a judicial determination of a constitutional violation. 384 U.S. at 648. Under this theory, the Court need only be able to perceive a basis upon which Congress could have determined that New York's literacy requirement violated the equal protection clause. Id. at 653. The Court adopted the deferential McCulloch v. Maryland, 4 Wheat. 316, 421 (1819) rationality test, for determining whether the legislation is "appropriate."

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. Id. at 650.

Put simply, the Court declared that §5 authorized Congress to (1) conduct independent factual investigations into suspected 14th Amendment violation, (2) determine whether a violation had occurred, and (3) enact appropriate remedial legislation. Accordingly, the Court held that it was unnecessary to make its own determination whether New York's literacy requirement was unconstitutional. The Court also held that its decision in Lassiter v. North Hampton Election Board 360 U.S. 45 (1959) sustaining North Carolina's literacy requirement was innapposite. Id. at 649.

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[4] The other theory was that Congress enacted §4(c) merely as remedial legislation to insure the Puerto Rican community nondiscriminatory treatment in the imposition of voter qualifications and the distribution of governmental services. 384 U.S. at 652.

The next case in which the issue of this power arose was Oregon v. Mitchell. Oregon involved a partially successful challenge to the Voting Rights Amendments of 1970 which provided, inter alia, that the voting age for all elections be lowered to 18. The Court was so divided, however, that the case offers little guidance in defining the scope of Congress' section 5 powers.[5] Indeed, Professor Tribe described the decision as "totally incomprehensible". L. Tribe, American Constitutional Law, p. 267 (1978).

Any doubts that Oregon might have raised about the validity of Morgan were recently put to rest in Fullilove v. Klutznick, supra. Fullilove involved a challenge to the "minority business enterprise provision" (MBE) of the Public Works Employment Act of 1977. That provision provides that at least 10% of all federal funds granted for local projects be used to enlist the services or supplies of minority owned businesses. By a 6-3 vote, the Court rejected the argument that MBE violated either the Equal Protection Clause or the equal protection component of the Due Process clause of the Fifth Amendment. The Court reaffirmed Morgan's statement of the scope of Congress' §5 powers.

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[5] Four Justices held the amendment constitutional. Four of the Justices held it unconstitutional. Only one Justice took the position that ultimately became the Court's holding: Congress could lower the voting age in federal but not state elections.

Applying the "perceive a basis" test, the majority held that Congress "had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities" and that "traditional ... practices ... could perpetuate the effects of prior discrimination." Id. at 2774, 2775.

In his concurrence, Justice Powell restated the Morgan doctrine:

> Congress has authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects. Id. at 2787 (Powell concurring).

Although not immediately apparent, Morgan and Fullilove establish a loophole in Marbury. In allowing Congress to make independent constitutional determinations, the Supreme Court acknowledged the existence of at least limited Congressional power under §5 to interpret the substantive provisions of the Fourteenth Amendment. As S.158 indicates, Helms and Hyde believe that it is under this Morgan interpretative power loophole that Congress can enact S.158. But the two men are mistaken if they believe that the Supreme Court in Morgan acknowledged a Congressional power to overrule its decisions. Aware of the dangers of unfettered Congressional power of Constitutional interpretation, the Court in Morgan severely limited Congress' access to the loophole just created:

> Contrary to the suggestion of the dissent, post p. 608, §5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate or dilute these guarantees. Thus, for example, an enactment

> authorizing the states to establish racially segregated systems would not be -- as required by §5 -- a measure "to enforce" the Equal Protection Clause, since that clause by its own force prohibits such state laws. *Morgan*, *supra* at 651, 652 n. 10.

This limitation, in effect, forbids Congress from using its §5 enforcement powers to violate those rights that the Supreme Court has previously declared to be protected by the Fourteenth Amendment. Thus, because the Supreme Court in *Roe v. Wade* found that the Fourteenth (as well as other) Amendments protected the right to an abortion, S.158 is unconstitutional. 410 U.S. at 152-156 and 169 (Stewart, J. concurring). The clear purpose of the bill is to restrict and dilute, if not abrogate, a women's protected right to have an abortion. This is exactly the kind of statute that the Supreme Court excluded from the *Morgan* loophole. Congress, therefore, like the States cannot, "by adopting one theory of life, ... override the rights of pregnant women that are at stake." 410 U.S. at 162. That the rights of a fetus would be increased by S.158 is irrelevant. Access to the loophole is barred if Congress' action would dilute a Fourteenth Amendment right, regardless of any concomitant increase in other rights. Otherwise, the limitation on the loophole would be meaningless and the *Morgan* doctrine would swallow *Marbury v. Madison*.

For example, Congress would have the power under §5 to enact a bill (call it S.159) authorizing the states to establish segregated schools, overruling *Brown v. Board of Education*, *supra*. It would merely have to declare that it has determined that the Fourteenth Amendment's right of liberty included the right to attend public schools only with members of one's own race. It is clear, however, that S.159 is unconstitutional, notwithstanding that its restriction on rights is accompanied by an increase in other rights. Yet, constitutionally speaking, S.158 is no different than S.159. Only at the expense of the Fourteenth Amendment right to choose an abortion is Congress creating previously nonexistent rights for fetuses. It is the presence of this diluting effect in both S.158 and S.159 that renders both bills unable to pass through the Morgan loophole.

III. CONCLUSION

S.158 is the result of strong anti-abortion attitudes present in this country today. Unfortunately, the supporters of S.158 have adopted a "win at all costs" attitude. They are willing to sacrifice the American constitutional system as we know it. They are willing to endanger the civil rights that thousands have fought and died for. Fortunately, there are many others more loyal to the system of government our Founding Fathers established 200 years ago who will prevent S.158 from becoming law. Consequently, the abortion foes should avoid this unnecessary constitutional crisis and concentrate their efforts on achieving their ends legitimately — by constitutional amendment.

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May 15, 1981

Senator Max Bauchus
U.S. Senate Committee on Judiciary
Subcommittee on Separation of Powers
Russell Senate Office Building
Room 8
Washington, D.C. 20510

Dear Senator Bauchus:

Enclosed is an article concerning the proposed human-life statute. I hope that this may be of some interest during next week's hearings.

Very truly yours,

Charles E.M. Kolb

Enclosure

CEMK/pl

The Proposed Human-Life Statute: Abortion As Murder?

by Charles E.M. Kolb [*]

> "We now proceed to explain the nature of 'personal identity', which has become so great a question in philosophy, especially of late years in 'England', where all the abstruser sciences are study'd with a peculiar ardour and application."
>
> David Hume, A Treatise of Human Nature
> I, iv, vi

When does a person begin? When does a person cease? It is probably safe to conclude that we are currently no nearer to answering these questions now than people were almost 240 years ago when David Hume's Treatise of Human Nature "fell," as he expressed it with unintended irony, "dead-born from the Press." Recent public debates over abortion and euthanasia have served to dramatize questions which have puzzled philosophers, scientists, and ordinary citizens for centuries. Advances in medical science have made it possible to prolong "life" in the strict physiological sense almost indefinitely. But does this mean that a "living"body sustained only by a respirator and by life-support systems is a "person"? Would pulling the plug -- or, alternatively, failing to plug in the respirator -- constitute murder?

Questions such as these have arisen with increased intensity with respect to a recent development in the abortion controversy. Is, for example, terminating a fetus the termination of a person? In its 1973 landmark abortion decision,

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*/ Mr. Kolb is an attorney in Washington, D.C. The views expressed in this article are solely his own.

Roe v. Wade, the U.S. Supreme Court declared that it did not have to decide when life began in order to resolve the abortion issue:

> "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 1/

Accordingly, the Court refused to decide when a person came into existence, and Justice Blackmun concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."

The Court's ultimate resting point on the matter was premised on the wholly unsatisfactory concept of fetal viability: abortions during the first two trimesters of pregnancy when the fetus was generally non-viable were, with minor qualifications, legal. Abortions performed in the last trimester, except for certain medical emergencies, were not. Roe v. Wade, however, raised more questions than it answered. First, there was the unresolved "personal identity" question, namely, what if there really *is* a person in the womb from the moment of conception? If this is the case, viability -- a purely scientific notion -- is irrelevant. Second, what if medical science advances to such a state that viability outside the womb becomes possible at a much earlier point in time (say conception or shortly thereafter) than is presently possible? If this occurs, then the Supreme Court's rationale has, effectively, been "overruled"

1/ 410 U.S. 113, 159 (1973).

by technology. Roe has left many of these fundamental issues unanswered for almost a decade.

Enter now the Congress. Currently pending before the U.S. Congress is a right-to-life statute which purports to settle every issue left open by the Supreme Court. Introduced by Senator Jesse Helms and Representative Henry Hyde, the statute is a device for resolving the open issues by simply legislating an end to all uncertainty. The statute decrees that "human life shall be deemed to exist from conception." The outcome is both clever and thorough. It is also one of the most draconian and potentially dangerous legislative exercises since Prohibition. The logic is relentless: if a person exists from the moment of conception, then abortion is murder.

The legal exegesis for this statute has been provided by its originator, Washington attorney Stephen H. Galebach whose article "A Human Life Statute" was recently published in The Human Life Review and has been the focus of national attention. Columnist William F. Buckley, Jr. has described Galebach's thesis as a "dazzling constitutional insight." Time Magazine has devoted a cover story to the issue, and author Galebach has defended his theory on The Today Show opposite Harvard constitutional-law scholar Laurence Tribe.

Galebach's thesis is that the Congress, as a matter of constitutional law, has the power and authority to adopt legislation enforcing what he claims is the Fourteenth Amemdment's "protection of life." He writes that "when a term of the Fourteenth Amendment cannot be defined by the judiciary in concrete application to a category of beings -- here the unborn -- then the definition of that term by Congress is appropriate legislation to enforce that Amendment."

The debate on the human-life statute will no doubt be vigorous. At the same time, it should be principled and clear-headed. Galebach's efforts challenge opponents to do battle with him on the merits -- not by merely disagreeing with his outcome, his politics, or his religious beliefs.

I strongly disagree with Galebach's thesis (not because I am pro-choice as opposed to pro-life), and I think that his theory can be rejected on numerous grounds. In short, while it can be demonstrated that his argument is unconstitutional as a matter of legal interpretation, it can also be shown that it reflects an inadequate understanding of philosophy and a dangerous approach to American political decision-making. This essay will spell out my arguments with respect to each of these claims.

Galebach's Legal Reasoning

Throughout his article, Galebach uses terms such as "life," "human life," and "person" interchangeably. These terms, however, are not interchangeable, and it is this fundamental misunderstanding which undermines his Fourteenth Amendment analysis.

Galebach's essay states (p. 6) that the Fourteenth Amendment protects life. That is incorrect: it protects "persons." The amendment says that no State "shall . . . deprive any person of life, liberty, or property, without the due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Now, there can be no question that whenever we have a "person" we have "life" in the physiological sense. To state, however, that whenever there is physiological "life" there is necessarily a "person" in existence too does not necessarily follow. For Galebach, however, it does follow because his statute simply declares it to be so. For philosophers who have contemplated this question for hundreds of years, the answer is less certain.

That Galebach's Fourteenth Amendment analysis proceeds by tautological sleight-of-hand is apparent when he states that

> "If Congress decides that unborn children are human life for the purpose of the Fourteenth Amendment's protection of life, it follows logically that they are 'persons' as well. By common usage of language, any human being must be recognized as a person." (p.8)

Unfortunately the epistemology at work here is all wrong. Galebach equates "unborn children" and "human life" with "persons." But this does not follow logically, unless, of course, you assume that whenever there is physiological life there is a person. The Fourteenth Amendment does not command such an equation.

To the drafters of the Fourteenth Amendment, problems of abortion and the status of the fetus were probably not issues at the time. They have only become issues because of modern scientific advances. At the same time, when the drafters used the term "person" in the Fourteenth Amendment, they no doubt meant it to accord with commonly accepted practice and meaning. Medical science, however, has provided the occasion for expanding and complicating that meaning. Galebach now says that the meaning of "person" -- a term in the text of the Fourteenth Amendment -- can be settled by legislative fiat to include "unborn child" and "human life." The long-settled rule of constitutional law is that questions of constitutional textual interpretation are for the Supreme Court, not the Congress. Galebach concludes that Congress can fulfill the definitional void because, as he puts it, the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article" which protects life. The amendment, however, protects persons from the loss of life. It does not protect "life" per se as an abstract concept, but rather persons from losing or otherwise being deprived of "life, liberty, or property."[1] The scope of constitutional protection insofar as that scope has been a matter of the textual interpretation of specific terms has always been a matter ultimately committed to judicial review -- not legislative fiat. Interpreting a specific term in the text of the Constitution is not the same thing as determining a so-called "legislative fact." For these reasons, the human-life statute must be declared unconstitutional.

Philosophical Confusion

At the outset I stated that "life" could not be equated with "persons" -- that while all "persons" were alive, not all "life," or even for that matter "human life," was necessarily a "person." Where Galebach differs, obviously, is in his assumption that wherever there is human life in the physiological sense there is a person. Upon further reflection, however, this conclusion does not necessarily hold.

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[1] At page 23 of his article, Galebach again confuses "life" with "person":

> "It is true, of course, that the suggested statute would create a situation in which states have a compelling state interest in the protection of unborn life, sufficient to justify anti-abortion statutes should states choose to enact them. Once the unborn child's status as human life and as a person is established by a branch of the government exercising power to enforce the Fourteenth Amendment, the states then have a constitutional standard of 'life' and 'person' to which they can refer. As the Supreme Court acknowledged in Roe v. Wade, the state then has a valid interest in protecting unborn life, and any challenge to a state's anti-abortion statute collapses." (footnote omitted).

In his article, Galebach ignores over two-hundred years' of Anglo-American philosophy with respect to personal identity. This philosophy, while occasionally abstruse, has posed a number of challenging questions overlooked by Galebach and his Congressional supporters. Traditionally, at least in Western philosophy, the concept of personal identity has been a unitary, psycho-physical concept. In other words, both bodily (physical) existence and psychological continuity (of which memory or consciousness perhaps may be the most important characteristics) are necessary to our notion of "person." Eliminate one from the other or separate them and our entire concept of "person" begins to break down. An example will demonstrate my point.

Suppose tomorrow morning I wake up and discover that I now possess my sister's memories and she possesses mine. Note that I did not say that I was my sister. Assume further that while in this condition I stab to death my neighbor. A day later our memories revert to their original bodies. Whom do we charge with the crime? Me? My sister? Or some third "person" who went out of existence? While my arm did the act, her consciousness provided the stimulus. Absurd as this example may seem , it serves to tell us something about how we conceive of a "person."[2/] Moreover, our present conception

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[2/] For a more detailed discussion of this and other related "mind-body" problems see Williams, "Personal Identity and Individuation," in Essays in Philosophical Psychology 324 (D.A. Gustafson ed. 1967).

of the insanity defense is not entirely unrelated to this example: diminished responsibility for one's actions in such instances is predicated on the belief than an "insane" person's mind should be divorced from his bodily actions for purposes of legal accountability. Society then tries to cure the mind, not punish the body.

Our concept of "person" seems to require the simultaneous functioning of mind and body, working together in the same organism. Consider, for example, this passage from Admiral Richard Byrd's autobiography of his weeks spent alone in an outpost far inside Antarctica when both his mind and body were on the verge of breaking from the severe strains which he was experiencing:

> "Do the mind and body exist separately along parallel lines? Is the physical part mostly mental, or the mind mostly physical? Indeed, how much division is there between mind and body? The body can take charge of the mind, but isn't it natural and best for the mind to take charge of the body? The brain is part of the body, but I am not conscious of my brain; the mind seems to be the real 'eye'." 3/

Byrd is raising all the right questions, and the answers are not immediately apparent. Nevertheless, through his own experiences, he was able to articulate something fundamental about the concept of "person."

The contemporary British philosopher David Wiggins discussed the problem of personal identity in these terms:

3/ R. E. Byrd, Alone 135-36 (1938).

> "It would be better . . . to analyse person in such a way that coincidence under the concept person logically required the 'continuance in one organized parcel of all that was causally sufficient and causally necessary to the continuance of essential and characteristic functioning, no autonomously sufficient part achieving autonomous and functionally separate existence.'" 4/

I submit that as a matter of philosophical principle, our concept of person -- our ability to explain what it is we mean when we use the term "person" -- will necessarily fall apart unless we adopt Wiggins' concept. As Sir A.J. Ayer has acknowledged, "it may well be thought a defect in my position that it requires the existence of these psychophysical relations to be assumed 'a priori.' But if this is a defect it is one that I see no way to remedy." 5/

If Wiggins and Ayer are correct (and I submit that if they are not, we will not even be able to discuss the issue intelligently as our language, logically, will break down) then any separation of or lack of continuity in this psychophysical relationship will entail the conclusion that a person does not exist. Moreover, one can reach this conclusion even when there is still the presence of "life."

Take the example of a brain-dead body. The mind is totally dead yet the body "lives" through life-support systems.

4/ D. Wiggins, Identity and Spatio-Temporal Continuity 55 (emphasis in original).

5/ A. J. Ayer, The Concept of A Person 128 (1963).

In many instances these bodies can "live" almost indefinitely -- a process which probably constitutes the perfection of the mummification process. But does a "person" exist? Would unplugging the respirator and other life-support systems mean murder? The answer is no.

This analysis permits us to deal with the equally important question of when does a person cease, as well as when a person begins. Moreover, it does so in a principled fashion which, unlike the Supreme Court's concept of viability, is not subject to becoming outdated by technological advances. With respect to the fetus, the answer provided by this analysis is a developmental one, controlled by the fetus and not modern science. In short, at the moment of conception, while there is life, there is no "person." At some point, probably between the fourth and ninth month of pregnancy, the fetus develops physiologically to the stage where a united, functioning mind and body exist. At that point, abortion would be murder. At that point, there are two lives at stake, not one, and the State is fully justified to act on behalf of that unborn person . . . but not before.

As a lawyer, what I cannot tell you is precisely when that point of psycho-physical unity in the fetus occurs. Since it probably varies from pregnancy to pregnancy, there will probably never be a definite answer since the point we are searching for is not static like conception in the sense that it can clearly be identified but rather developmental in the same sense that maturity is. But what I can tell you is that the point of psycho-physical unity does not exist at the moment of conception; nor does it exist until several weeks into a pregnancy. Up until that point is reached, the woman should have the right to terminate the life within her womb because that life is not yet a person.

Policy or Fact?

Galebach's article commits a fundamental philosophical mistake: it ignores the distinction between "is" and "ought." As David Hume taught, to say or determine that something is the case is not the same as concluding that it ought to be that way. With respect to the proposed human-life statute, the typical is-ought controversy is inverted, with its proponents, in effect, arguing that because something ought to be the case, they can simply mandate that it is the case.

At page 20 of his article, Galebach writes that "the crucial point, however, is that Congress does not need to be *certain* of an answer before it declares a national policy on when human life begins." Declaring when human life begins, however, is not a policy question but rather a fact question. Policy questions deal with what ought to be the case; fact questions deal with ascertaining what is the case. It simply makes no sense to speak of having a national policy with respect to a fact; it simply is or it isn't, and declaring it to be the case (if it isn't) won't change things much.

Again, an example will highlight the point. Suppose that for reasons of national policy with respect to defense or space exploration we need to know whether there is life in Galaxy X. At this point, we are, at best, uncertain about the answer. But we nevertheless need to know. So Congress, desirous of implementing its policy goals, simply legislates that life exists in Galaxy X. This answers the question for sure, but how many of us would feel satisfied that the answer is true?

Americans, so a British friend once said, are always confident that every problem has a solution, that every difficulty can always be resolved. While such optimism in the face of challenge and uncertainty may lead to perseverence and frequently success, there is always the danger that failure to resolve a problem or failure to resolve it to one's liking will result in an arrogant disregard for differences of opinion. As a political matter, it is this aspect of the Galebach theory that I find not only unsupportable but fundamentally dangerous to freedom-loving people who resolve issues by trial and error along with persistent, penetrating thought.

The Galebach theory holds that since we cannot be certain about when a person or human life begins, we can nevertheless cut off all further inquiry and mandate certainty.

As a matter of political theory, one can do that with policy questions. That is what the "ought" is about -- an issue which can and should be resolved by elected representatives. It is when elected representatives assume the arrogant posture of legislating reality or facts that they have overstepped their authority as well as the checks and balances inherent in our political system. I submit that at bottom it is this feature of the human-life statute which will create the most outrage and disgust. Yet I say this not because I am pro-life or pro-choice but because what this statute seeks to accomplish is fundamentally repugnant to principles of democratic freedom. As George Orwell assured us when he coined the term "doublethink," we are capable of ascertaining the facts for ourselves. If the facts are complicated, stating that they are otherwise will not make them so. If, on the other hand, we are forced to believe that certainty exists when in fact it does not, or, if we are forced to swallow a policy based upon a "fact" that we may or may not believe, then we have sacrificed more than just a fact; we have sacrificed our minds and our freedoms.

Galebach has an answer to this argument -- albeit an unsatisfactory one in my opinion. He notes that Congress is often called upon to make decisions in the light of imperfect or uncertain evidence:

> "Congress has often taken action to protect life when the uncertainties were at least as great as in the matter of abortions. Regulating the use of new, relatively untested drugs, regulating or refusing to regulate the use of tobacco, requiring passive restraint devices in cars -- all such actions involve a calculation of the risk that human life will be lost without federal action, combined with a rough weighing of how much we value the possible risk of loss of human life. In all these decisions the protection of life conflicts with the convenience of many people. Sometimes, as for instance with drugs, the protection of persons from possible harmful effects conflicts directly with the grave medical needs of other persons. Decisions related to possible risks to human life are not only appropriate for Congress, they are far more appropriate for Congress than for the courts." (Page 21).

His analogies are inapposite, however, for a variety of reasons. Risk calculations depend on probabilities and statistics with respect to expected occurrences. Regulating relatively untested drugs is, I submit, different from defining when a person begins or ends. The uncertainty with respect to the drugs relates to the frequency of harmful occurrences, not to the fact that the drugs may be harmful. The risk analysis tells us with a reliable degree of certainty that in some instances the drug will be harmful. That determination is a proper legislative fact. Depending upon the probability analysis, the regulatory agency then promulgates its policy with respect to ultimate licensing and marketing of the drug.

Risk analysis, however, tells one nothing with respect to whether we have a person inside the womb at the point of conception. Either there is or there is not. Period. Probability and statistics are no guide to resolving this type of factual question.

As Professor Tribe has recognized, "Congress . . . possesses the power to investigate and to compel testimony in connection with the exercise of its powers of self-regulation."[6] He further notes that "[i]nvestigations in aid of legislation encompass 'inquiries concerning the administration' of existing laws as well as proposed or possibly needed statutes."[7] Yet, at the same time, "[t]he congressional power of investigation is . . . limited by the separation of powers. Congress may not usurp the functions of the courts."[8] It is, after all, the very bedrock of American constitutional law that it is up to the courts, not Congress, to interpret and apply the Constitution.[9]

The Supreme Court, as the ultimate authority on the meaning of the Constitution, has already decided that the definition of "person" -- at least as of 1973 -- was unanswerable. That determination by itself should be the end of the matter, until such time as the answer becomes clearer. For the Congress to legislate its own definition in light of the Court's pronouncement is itself an unconstitutional step in violation of the separation of powers. Thus, while I disagree on substantive grounds with the definition of "person" which Galebach offers and have suggested a positive approach for reconsidering some of these questions, the mere action by the Congress to step into the breach must be deemed unconstitutional as a violation of the separation of powers.[10/] Roe v. Wade was certainly not an invitation by the Court to the Congress to define a term within the text of the Constitution which the Court itself could not resolve. While wrestling with uncertainty may be uncomfortable, I submit that doing so is far healthier than being force-fed "certainty" simply because some legislators feel that we need an answer now.

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[6] L. Tribe, American Constitutional Law 298 (1978).

[7] *Id.* *citing* Watkins v. United States, 354 U.S. 178, 187 (1957).

[8] *Id.*

[9] *See, e.g.*, Marbury v. Madison, 5 U.S. (Cranch) 137 (1803). Ironically, Professor Tribe notes that Chief Justice Marshall "decided *Marbury* at a time when the idea that legislatures would ignore principle in order to please controlling 'factions' . . ." was feared. *Id.* at 22. *See generally* G.E. White, The American Judicial Tradition 7-34 (1976).

The proposed human-life statute is in effect a bold attempt by some members of Congress to usurp the function of the judiciary. In short, while Congress can determine so-called "legislative facts," it simply should not be in the business of mandating the basic facts which are intended to serve as a substitute for consensus and as an end-run around the Constitution. This is especially the case when the fact in issue involves the

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[10/] I should emphasize that while I have offered my own positive view with respect to defining "person," the Congress is in no position to legislate my prescription any more than it is Galebach's.

definition of a constitutional term. That is a job committed to the courts. As a matter of political legitimacy, doing so is unwise and dangerous. Moreover, as in the present case, it virtually guarantees the absence of consensus on the very policy question at issue, by virtue of the fact that some people resent attempts at legislating reality. You cannot mandate a consensus by fiat. On the contrary, as Prohibition demonstrated, you create the conditions for disarray in the body politic.

It is an altogether different matter for Congress (or the courts) to promulgate a policy premised upon protecting persons once they are found to exist. The policy is premised upon a factual assessment, and factual determinations, even when they are uncertain, cannot be resolved by legislative fiat. The problem is that determining the point at which psycho-physical unity arrives is inherently an uncertain process. Making this determination is difficult because persons evolve developmentally, from small clusters of cells to embryo to fetus. Resolving this issue, then, is like pointing out the colors on a spectrum: we can identify blue, green, and yellow. The extremes are clearly defined, but we will never be able to identify precisely at the margins just when blue becomes green and green becomes yellow. Legislating a solution to this type of uncertainty resolves nothing.

Yet, we are faced with a social problem of immense practical significance. We cannot simply throw up our hands, declare the issue to be unresolveable, and then look the other way. I submit that the answer should lie in first understanding the concept of "person" as it involves the developmental characteristics discussed earlier. Although we cannot define precisely the moment when a person comes into being, we can state with some degree of certainty that it occurs sometime after a particular period during pregnancy. It is this period at which the mother's choice affects not just herself but another person as well, and the State is warranted in adopting a policy which terminates the mother's freedom of choice to seek an abortion. Up until this point is reached, freedom to abort must prevail.

I recognize that the analysis which I offer here will offend a great many people. Ardent believers in pro-choice may be uncomfortable with a qualified approach which circumscribes a mother's freedom to choose after a given point in time. Pro-life supporters will reject the argument that a person does not exist from the moment of conception. Nevertheless, I firmly believe that the issues discussed here cannot be defined away as the human-life statute purports to do. The Galebach theory chokes off debate and discussion by mandating answers to factual questions. But facts are not so malleable: either they are or they aren't. In my opinion, the arguments which I have offered here constitute a basis for resolving both key questions of when a person begins and when a person ends. The public debate which I hope to generate should, therefore, focus on the developmental continuum in an effort to articulate more precisely just when this point of psycho-physical unity occurs. In large part, this research will involve the best minds in medicine, and the answer will not necessarily be readily forthcoming.

There is one aspect of my analysis which requires a word of caution. In trying to identify this moment of psycho-physical unity, I am in no way suggesting that such an endeavor is or should be a qualitative operation. I am not suggesting that we decide whether or not we have a person solely on the basis of the _quality_ of mental activities present. To do so would run the risk of condemning people of low intelligence in the same manner that courts once permitted involuntary sterilization on the ground that three generations of imbeciles were enough. Again, I submit that this too is a question which is more readily resolved at the extremes than in the middle of the continum: a brain-dead body is not a person. What I cannot answer is the quantitative questions of what activity, how much, and in what relation to the human body. What I have tried to suggest is that these questions should occupy our thinking and scientific research.

I would like to conclude with a situation which illustrates many of the points raised in this article. Seven years ago a friend's first "child" was born with severe brain damage. Through an apparent freak or random genetic occurrence, the "baby" was born with its brain almost fully exposed. A team of neurosurgeons and neonatologists advised the couple to do nothing in the way of requesting life-support systems; the "baby" would surely die if left unattended within a week to ten days. Today, the "baby" still lives. Doctors have determined that it has no cognitive functions whatsoever. It doesn't hear, see, or make sounds. It doesn't walk or move about from the bed on which it lies. It sleeps with its eyes fully open. Nevertheless, it has continued to grow at approximately the same growth rate as a normal seven-year-old child.

For years, I have considered this question over and over: had the doctors or my friend and his wife terminated "its" existence, that is, put an end to its physiological and biological life, would they have committed murder? Would they be killing a person? My answer is no. Although this is an extreme case, it is no more susceptible to resolution by Congressional fiat than the abortion question is. Analytically, the two issues are inseparable, and Congress cannot define its way out of the controversy by legislating an end to all doubt.

My friend and his wife named their "baby" Christopher. I still wonder what difference that makes.

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June 11, 1981

Hon. Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

It is an honor to be requested to present my views on S. 158. My interest in the subject of this bill derives from my work on problems of the American judiciary and my concern for the appropriate allocation of business between state and federal courts. The precise constitutional reach of Congressional power to fix the jurisdiction of the federal courts, while often clear, can pose unusually difficult questions. It is that aspect of this bill that elicits my interest, and it is the only aspect of the bill on which I feel equipped to speak. Questions concerning abortion and the commencement of life are questions on which I have no more expertise than any other citizen, and I will not attempt to address those matters.

Discussion of the jurisdictional provision in S. 158 can be divided into two parts: the question of its constitutionality and the question of its desirability as a matter of legislative policy. I shall address them in that order.

Constitutionality of Section 2

The beginning point in considering this question is the premise that Congressional power to regulate the jurisdiction of the federal courts is broad indeed. The wide reach of this power is supported by the proceedings in the Constitutional Convention of 1787, the text of the Constitution, the actions of the first Congress in the Judiciary Act of 1789, custom and practice embodied in legislation since that time, and decisions of the Supreme Court. The power specifically vested in Congress in Article I and in Article III to create tribunals inferior to the Supreme Court has, from the beginning, been considered to carry with it the power to define the jurisdiction of those inferior tribunals.

This Congressional power, in addition to being supported by history and practice, is also supported by sound political theory concerning democratic government. Perhaps the most fundamental premise of a democracy is that ultimate power resides in the people. The people assert their sovereignty through their elected representatives--the Congress and the President. The judiciary--the third branch of the government--is likewise an essential part of the constitutional scheme. It is a balance wheel in the system, assuring the maintenance of government under law and keeping the popular sovereignty of the democratic theory from becoming mob rule or government by arbitrary whim. But the judiciary, like all government, must be ultimately accountable to the sovereign power--the people. Indeed, if the courts were not ultimately thus accountable, they would not last long. Congressional control over the jurisdiction of the courts is one way of assuring this accountability. This legislative power to prescribe what business the courts may handle and what business they may not handle is essential to the independence and viability of the judiciary. When we acknowledge this power in the legislature, we acknowledge, in effect, that what the courts do they do with the consent and acquiescence of the people.

To acknowledge a broad Congressional power to regulate judicial jurisdiction, however, is not to say that this power is without limit. Indeed, no power of Congress is without limit. The power to regulate jurisdiction, like all other congressional powers, is subject to restraints imposed by express constitutional provisions and the constitutional scheme as a whole. The constitutionality of the jurisdictional provision in Section 2 of S. 158 can be analyzed by considering three kinds of constitutional restraints on Congressional power over judicial jurisdiction: restraints imposed by Article III, restraints imposed by other provisions of the Constitution, and restraints imposed by the separation of powers doctrine.

1. Restraints imposed by Article III. These restraints mainly set outer limits on the powers that can be granted to the courts. Congress cannot authorize jurisdiction in the federal courts that exceeds the jurisdiction described in Article III. For example, Congress could not authorize a federal district court to entertain a case between private parties where no party is of diverse citizenship from any other and where no ingredient of federal law is involved.

Restrictions of this sort are not involved in S. 158. Rather, this bill seeks to redefine jurisdiction so as to withhold from the lower courts powers that Article III would permit them to exercise.

2. Restraints imposed by other provisions of the Constitution. The Congressional power to fix the jurisdiction of the federal courts is limited, like all other Congressional power, by other provisions in the Constitution outside of Article III. The Constitution contains numerous express prohibitions on Congressional power, most of which are contained in the Bill of Rights. Congress in exercising its power to regulate commerce, for example, cannot violate the First Amendment prohibitions on its power to regulate speech. Congress could not, for example, under its commerce power enact a statute forbidding any person who made a speech in favor of abortion on demand from traveling in interstate commerce. Likewise, Congress under its power to regulate the jurisdiction of the federal district courts could not provide that anyone who made a speech favoring abortion on demand could not invoke the jurisdiction of the federal court in a diversity case. As another illustration, the various kinds of classifications that the Constitution forbids--such as classifications on the basis of race or religion--cannot be embodied in jurisdictional provisions. For example, Congress could not constitutionally provide that no person of Polish ancestry could invoke the jurisdiction of a federal court. This would surely be considered to violate the equal protection elements that have been read into the Due Process Clause of the Fifth Amendment.

Consistent with the Due Process Clause, however, Congress has the power--and has exercised it throughout our history--to pick and choose among types of cases and kinds of remedies it will permit in the federal courts. There are numerous examples of statutory provisions in which Congress has specifically excluded categories of cases from federal court jurisdiction. In 28 U.S.C. § 1445, for example, Congress has specified three types of cases over which federal district courts may not take jurisdiction on removal. Federal courts are expressly prohibited by statute from reviewing actions by the Veterans Administration denying benefits to veterans. 38 U.S.C. § 211. In cases of diverse citizenship if the amount in controversy is not more than $10,000 the federal district court does not have jurisdiction because of a statutory restriction. 28 U.S.C. § 1332. Also under that statute, where there is a co-citizenship between any one plaintiff and any one defendant, the federal district court cannot entertain the action. Until 1875, an action attacking the constitutionality of an abortion statute could not have been brought in the federal courts because Congress had not authorized jurisdiction over such actions. Until 1867, a federal district court could not entertain a petition for habeas corpus where the petitioner was confined by state rather than federal authority, because that is the way Congress had defined jurisdiction. Indeed it is striking to note the extent to which Congress restricted for nearly a century the jurisdiction of the federal trial courts. This statutory pattern is summarized in The Federal Courts and the Federal System 844-47 (2d ed. 1973).

In addition to its power to grant and withhold jurisdiction over categories of cases, Congress also has broad power to grant or withhold authority for the lower federal courts to employ certain kinds of remedies. This power likewise has been exercised by Congress throughout our history. Until 1934, for example, the federal district courts could not render declaratory judgments because Congress had not authorized such a remedy. Having granted authority to employ such a remedy in 28 U.S.C. § 2201, Congress presumably could now withdraw it in some or all types of cases. In several instances Congress has prohibited federal courts from employing the equitable remedy of injunction. For example, 28 U.S.C. § 1342 prohibits district courts from restraining rate orders issued by state regulatory agencies, except under defined circumstances. Similarly, 28 U.S.C. § 1341 prohibits, with qualifications, district courts from enjoining the assessment or collection of state taxes. Perhaps the best known Congressional restriction over the remedial power of the courts is the Norris-LaGuardia Act. 29 U.S.C. §§ 101-115. Congress there prohibited district courts from issuing injunctive orders "in a case involving or growing out of a labor dispute . . . ." The constitutionality of that remedial limitation was sustained in Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938).

In view of this history and practice it would be difficult to maintain that Congress could not constitutionally prohibit the lower federal courts from entertaining actions involving the constitutionality of legislation concerning abortions. The state courts would remain open to entertain such cases, and they would be required to apply the federal Constitution, by force of the Supremacy Clause. The state court decisions in such cases would be reviewable by the United States Supreme Court. Such an arrangement was clearly contemplated by the framers of the Constitution. Moreover, history and practice make it difficult to argue that it would be unconstitutional for Congress to prohibit federal courts from issuing injunctive orders or declaratory judgments in abortion cases. But Section 2 of S. 158 is not a provision of that sort. It does not simply remove from the federal district courts, by general and neutral language, cases involving the constitutionality of abortion laws. Nor does it simply prohibit the use of injunctive and declaratory remedies in abortion cases generally.

Section 2 of S. 158 prohibits federal district courts from issuing injunctive or declaratory decrees

> in any case involving or arising from any state law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

Although the scope of this language may be debatable, the intent appears to be to withdraw these remedial powers only where state law prevents or restricts abortions or funding and procedures designed to limit the availability of abortions. Under that reading of the bill's language, the courts would retain injunctive and declaratory power where state laws were aimed at allowing abortions or facilitating or increasing access to abortions.

If this reading of the proposed statutory language is accurate, this jurisdictional restriction is unlike that in the Norris-LaGuardia Act. In that Act, equitable remedies were precluded in "labor disputes." To be analogous to that kind of remedial restriction, the bill would have to be phrased as a restriction in "abortion cases" or "in cases arising under or involving any state statute or regulation concerning abortion." The difference is that the latter, like the Norris-LaGuardia Act, would be a generalized, neutral withdrawal of remedial authority in a designated type of case. Section 2 of S. 158 withdraws authority only where the state regulatory power has been exercised in a particular direction, namely, to prohibit or restrict abortions.

Two hypothetical cases illustrate the effect of this bill, if enacted.

A. Assume that a state enacted a statute making it illegal for anyone to perform or to obtain an abortion under any circumstances. A plaintiff with appropriate standing who brought suit in a federal district court against the appropriate defendants would be blocked by S. 158 from obtaining an injunction against enforcement of the statute and from obtaining a declaratory judgment on the validity of the statute.

B. Assume that a state enacted a statute making it lawful for a person to obtain an abortion at any time if in the judgment of a licensed physician, an abortion were necessary or desirable in the interests of the pregnant woman. If a plaintiff with appropriate standing brought suit in a federal district court against the appropriate defendants, attacking the validity of this statute, the court would retain all authority which it presently has to issue injunctions or declaratory judgments. Its powers would be unaffected by Section 2 of S. 158.

The upshot is that plaintiffs attacking statutes restricting abortions are treated differently by the bill from plaintiffs attacking statutes permitting abortions. The bill, in other words, allows or prohibits certain judicial remedies depending upon which side of the substantive constitutional issue the plaintiff asserts or represents. The question presented is whether this distinction denies the equal protection of the laws, to the extent that this concept is incorporated into the Due Process Clause of the Fifth Amendment, to those plaintiffs denied access to these remedies. This question seems to me to be debatable, and I would not be confident in predicting whether the Supreme Court would ultimately hold that this jurisdictional restriction is unconstitutional under the Due Process Clause.

Apart from this possibility, I do not see any other express provision in the Constitution that would prohibit Congress from enacting Section 2 of S. 158.

3. Separation of powers doctrine. This doctrine does not involve any express prohibitions of Congressional power; rather, it involves limitations stemming from the theory underlying the whole constitutional scheme. Under this theory, the judicial branch is independent of the legislative and executive branches.

However, the separation is not watertight; nor is it neat and tidy. Each branch does exercise powers affecting the others, and there are some overlaps of authority. The lines of separation cannot be defined in general in a way that answers all questions. However, it seems fair to say that the separation of powers theory requires that the judicial branch be left free of interference from the other two branches in deciding the cases that do come before it under its jurisdiction.

It would violate the separation of powers doctrine, for example, for Congress to undertake by statute to direct a court how to decide a particular case. Of course Congress can in effect direct how courts must decide matters by laying down general rules of substantive law, as it typically does in its enactments. But presumably Congress could not, for example, grant jurisdiction to the federal district courts to entertain criminal prosecutions and by statute authorize them only to enter convictions, withholding jurisdiction to enter acquittals. Likewise, Congress could not authorize the federal district courts to entertain actions to recover money damages for personal injuries and, at the same time, authorize the court only to enter judgments for plaintiffs, withholding jurisdiction to enter judgments for defendants. In other words, although Congress can grant jurisdiction over a category of cases (or withhold jurisdiction over that category), Congress cannot grant jurisdiction over a category of cases and simultaneously skew the courts' powers so that the courts can grant relief or determine the outcome in only one direction. The separation of powers doctrine would seem to require that a court must be independent to exercise its judgment and apply the generally applicable law, as the court perceives it, to the facts of the case at hand, as the court finds the facts.

As explained above, Section 2 of S. 158 seems to be a one-way limitation on the courts' authority. It would allow relief to persons attacking state laws permitting abortions, while prohibiting the courts from affording relief to persons attacking state laws restricting abortions. Is this the kind of Congressional intrusion into judicial business that violates the separation of powers doctrine? This question, like that under the Due Process Clause mentioned above, seems debatable. There is no decision of the Supreme Court that appears to be controlling; and no previous Congressional regulation of judicial jurisdiction seems precisely analogous. Novelty alone, however, does not necessarily condemn a statute. As with the due process question, I would not be confident in predicting how the Supreme Court would ultimately decide this separation of powers question.

4. The relationship to section 1 and the bearing of the Separability clause. In all of the foregoing, I have addressed the constitutionality of Section 2 without regard to its relationship to Section 1 of the Bill. On the one hand, this seems justifiable in light of Section 3--a separability provision. The intent of Section 3, among other things, is to ensure that the jurisdictional regulation in Section 2 remains in force even if a court should hold Section 1 to be invalid. On the other hand, considering the constitutionality of Section 2 without regard to the constitutionality of Section 1 seems, at least in part, to be an arid and meaningless exercise. This is especially true as to the provision of Section 2(1) where the court's remedial authority is restricted in relation to state law which "protects the rights of human persons between conception and birth." Those words have no meaning apart from Section 1 which declares that human life exists from conception and that a "person" is in being after that point. If this provision in Section 1 were held invalid, it is difficult to see how the jurisdictional provision in Section 2(1) would be left with any intelligible content. This may be one of those situations where despite the intent of Congress as to separability, these provisions are so enmeshed that they cannot be separated.

This line of analysis suggests that in order to assess the constitutionality of Section 2--at least in relation to Subsection 1--we are driven unavoidably to a consideration of the constitutionality of Section 1. The latter is a question which I am not prepared at this point to address in any depth. On its face, at least, Section 1 appears, in effect, to prescribe a definition of "life" that would bind the courts in applying the due process protections of "life." Any effort by Congress to fix by statute the meaning of constitutional language is of dubious validity, to say the least. Under Marbury v. Madison, 1 Cranch 137 (U.S. 1803), authority to say what the words of the Constitution mean lies with the court, where the issue arises in a contested case and its resolution is necessary for its disposition.

A member of Congress may approach the question of the constitutionality of a bill in two ways. He may view the question as one of predicting what the Supreme Court would in fact hold. On the other hand, he may take the view that a legislator may determine the question of the constitutionality of a pending bill independently, without feeling bound by a prediction as to what the Supreme Court would in fact hold. Under both approaches the conclusion seems equally murky as to the constitutionality of Section 2 under the Due Process Clause and the separation of powers doctrine. Although history and practice support extremely broad Congressional power over judicial remedies, the novelty of Section 2, with its one-way restriction on remedies, makes debatable any conclusion as to its validity. Insofar as Section 2 is inextricably tied into Section 1, with its definition of "life," the likelihood of Section 2's unconstitutionality is increased.

In light of the uncertainty about constitutionality, the controlling consideration should be the desirability of such a jurisdictional restriction, assessed pragmatically and in light of the public interest, as a matter of legislative judgment.

Desirability of Section 2 as a Matter of Legislative Policy

Not everything that is constitutional is, of course, wise or helpful. Indeed, the Constitution permits Congress to do a great deal that may be foolish, unsound, or detrimental to the public interest. There is an unfortunate tendency in this country to discuss proposed legislation only in terms of its constitutionality. That sometimes distracts attention from the more important question, namely, whether the legislation is a good idea.

Although the main purpose of this letter is to offer some thoughts about the constitutionality of Section 2 of S. 158, I will make a few observations about the approach a legislator should take in deciding whether this bill is a sound proposal and in the public interest.

The statutes that have been inactive at various times in the past to withdraw remedial powers from the federal courts have been prompted by public concern over the ways in which federal district courts were handling those matters. The statutes restricting injunctions in state utility rate cases and state tax cases, for example, reflected a Congressional judgment--probably stemming from varying motives--that the use of federal injunctions was too disruptive in those important areas of state governmental concerns and that such injunctions generally ran counter to interests that the majority of Congress thought should be free of federal judicial intrusion at the trial level. In short, the Congressional opinion was that controversies over the constitutionality of such state regulatory actions could best be adjudicated by litigation initially through state court systems, with ultimate review available in the U.S. Supreme Court.

The Norris-LaGuardia Act similarly reflected a Congressional judgment that federal district court injunctions in labor disputes were, in the main, contrary to the public good and to those interests that Congress thought should be free of such judicial control. Although, as indicated above, that statute was phrased in general, neutral terms, in practice its impact was mainly in one direction. Federal district courts had been issuing injunctions at the instance of employers who, as plaintiffs, sought to enjoin employees from striking or from certain other kinds of collective labor activity. The Act, by its terms, also prohibited employees from seeking injunctions against employers in a labor dispute. However, employee suits, as a practical matter, were not the cases that troubled Congress and the public. Congress was intent on preventing federal injunctions against striking employees. In practical impact, that is what the Norris-LaGuardia Act did, although it was not so phrased.

One could argue that this comes close to the kind of restriction embodied in Section 2 of S. 158. If enacted, this bill could be said to embody a Congressional judgment that the federal district court should stay out of the business of enjoining state statutes and regulations which seek to limit or prevent abortions. If Congress is entitled to make the kind of judgment, based on its perception of the public good, that is embodied in the Norris-LaGuardia Act, it is difficult to maintain that Congress is not likewise free to make a similar judgment in relation to the use of federal injunctions to block state efforts to restrict abortions. Whether such a restriction on federal judicial authority is a good or bad thing is, I submit, the ultimate question that a member of Congress must resolve in voting on this bill.

Underlying this question are at least two other questions:

(1) Are the U.S. district courts or the U.S. Courts of Appeals issuing or approving injunctions or declaratory judgments in ways that undesirably disrupt state efforts to control the availability of abortions?

(2) Would the adjudication of controversies involving the constitutionality of such state efforts be handled in a better way by requiring that such litigation be initiated in the state courts, where the evidentiary record would be made and the facts found, with provision for U.S. Supreme Court review based on the state-made record?

It is not my purpose here to undertake to answer these questions. The answers depend on an array of information not presently available to me. However, it does seem to me that the constitutional questions involved in Section 2 are sufficiently debatable that a member of Congress should not feel compelled to vote against Section 2 solely because of constitutional concerns. If a legislator believes strongly, as a majority of them did at the time of the Norris-LaGuardia Act, that federal injunctions are undesirable or harmful to the public interest, then a vote for at least Section 2 of the bill would be appropriate. Although I believe that *Roe v. Wade*, 410 U.S. 113 (1973), may have been unfortunate in constitutionalizing the subject of abortion (not to mention its undertaking to deal with questions not necessary to a resolution of the case at hand), I have grave doubts that legislation of this sort is desirable. I would have no constitutional difficulty with a statute withdrawing the authority of the lower federal courts over cases involving the constitutionality of state abortion statutes or regulations. What is troubling here is the effort to define ultimate constitutional terms by statute, to link a jurisdictional provision to that definition, and to restrict federal remedial powers in one direction only.

Sincerely yours,

Daniel J. Meador

DJM:djr

THE
GEORGE
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APR 29 AM 9 12

24 April 1981

Senator Max Baucus
Senate office Building
United States Senate
Washington, D.C. 20510

Re: S. 158

Dear Senator Baucus:

Your letter dated April 13, requesting my assessment of S. 158, has been forwarded on to me here in Key West.

Attached hereto is a brief memorandum, setting forth my judgment on the constitutionality of the bill. In addition, I have made some comments on the desirability of such a bill. In my view, the question of constitutional power and wisdom, even though purportedly separate questions, cannot be thought of in fact being separate. Each affects the other and vice versa. That is particularly true of S. 158.

My conclusions, as developed in the attached memorandum, are as follows: (a) there are serious doubts about the constitutionality of both Section 1 and Section 2 of S. 158; and (b) the bill is an extremely unwise piece of proposed legislation.

Were I still in Washington, I would be happy to testify before the Subcommittee along the above lines.

Yours sincerely,

Arthur S. Miller
Professor Emeritus of Constitutional Law

1106 Fleming Street
Key West, Florida 33040

Encl.

I should appreciate your sending me copies of 127 Con. Rec. S.288-S.294 (Daily Ed., Jan. 19, 1981) and of the studt on the question by Congressional Research Service.

24 April 1981

MEMORANDUM

TO: Senator Max Baucus
Subcommittee on Separation of Powers
Senate Judiciary Committee

FROM: Professor Arthur S. Miller

RE: S. 158

In response to your request in your letter dated April 13, 1981, this is my assessment of the constitutionality of S. 158. I have in addition made some comments on the wisdom of this bill.

1. There are two constitutional problems in this bill, each of which presents serious, perhaps insuperable, problems of validity under the Constitution. First, some preliminary observations:

a. Section 1 declares that Congress "finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." There is an immense problem of definition here: What is "human life"? Such a "finding," if made, seems to me to assume the answer in the way that the first part of Section 1 reads. Surely the Subcommittee will want to ask witnesses from the scientific community how they define "human life." That is crucial to the concerns of the Subcommittee. (I am not a scientist, and indeed am not at all sure that scientific testimony should be conclusive on this point of what is human life, but I find it impossible to consider _human_ life to be anything else than a _live being_ capable of living outside of the womb. The entire history of Anglo-American law is to that effect.)

b. Section 1 also declares that Congress "finds that the fourteenth amendment . . . was intended to protect all human beings." Note, first, the inconsistency in language--between "human life" and "human beings." Are the terms synonymous? Next, what possibly can "all" mean? Does it mean all persons throughout the world? That hardly can be true. But the sentence does not say so. Of perhaps more substance, the fourteenth amendment was written in express terms to protect "all _persons born or naturalized_ ...." That being so, it is clear beyond doubt that Congress does not have constitutional power to amend the Constitution _by itself_--which is precisely what the second sentence of Section 1 would do. It would make the fourteenth amendment read "all persons conceived or naturalized....." That Congress cannot do.

2. The third paragraph of Section 1 is also constitutionally infirm.. First, it is, as stated above, not accurate to say "...all human life as defined herein." I see no adequate definition of that term. Next, the Supreme Court in _Roe_ v. _Wade_ determined that personhood under the fourteenth amendment did _not_ include fetuses. As you know, the Court established

a "trimester" system as to when the several states have an increasingly compelling interest in which abortions can be regulated. Congress cannot overturn a Supreme Court decision by statute. The same arguments apply here, and are dispositive, as are outlined in paragraph 1.b., above. In this connection, with respect to the power of Congress under Section 5 of the fourteenth Amendment, that power relates to "the provisions" of the amendment. The words "provisions" can only apply to such matters as privileges or immunities, due process of law, and equal protection of the laws, etc. By no means does it mean that the word "persons" can be redefined. Cf. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in which Justice Brennan, speaking for the Court, said in footnote 1: "We emphasize that Congress' power under Sec. 5 *is limited to adopting measures to enforce the guarantees* of the amendment." (Emphasis added.) That means that Sec. 5 is not a "two-way" street, as Justice Brennan said in that same footnote; in other words, Congress can *expand* rights of *persons* but *cannot limit existing constitutional rights.* Under *Roe* v. *Wade* and other well-known Supreme Court decisions, women cannot constitutionally be denied the right to an abortion in the first three months of pregnancy. (As said before, during the second three months and the final three months, there is a steadily increasing right of the state to intervene.) Justice Brennan said that Congress could not, through use of Section 5 of the fourteenth amendment, "establish racially segregated systems of education" because that would not be a measure "to enforce" the equal protection clause "since that clause prohibits such state laws." So it is here. There is nothing in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), to the contrary. In sum: women have been accorded constitutional rights regarding abortion; Congress cannot dilute or infringe on those rights by a simple statute.

3. Section 2 attempts to prevent federal courts from ruling on state laws concerning "human persons" not born and the regulation of abortions. Again, it is by no means clear that Congress has the constitutional power so to divest lower federal courts of that type of jurisdiction. The leading case is *Ex parte McCardle*, 7 Wallace 506 (1869); but that dealt with the Supreme Court's *appellate* jurisdiction. The Supreme Court did uphold the Norris-LaGuardia Act of 1932, depriving federal courts of "jurisdiction" to issue injunctions in labor disputes. See *Lauf* v. *Skinner & Co.*, 303 U.S. 323 (1938). The general problem is discussed in Gunther, *Cases and Materials on Constitutional Law* 50-63 (9th ed. 1975). Professor Gunther seems to believe the question is an unsettled one. The basic problem is whether under Article III of the Constitution "the judicial power" is derived from the Constitution or is dependent on an Act of Congress. Section 2 of Article III says that "the judicial power shall extend to all cases ... arising under this Constitution...."--which seems to be clear warrant for maintaining that the Constitution is itself the source of the judicial power. That is so despite the holding in the *Lauf* case above. Certainly Congress thought so in 1798 when the eleventh amendment was promulgated to "reverse" the Supreme Court's ruling in *Chisholm* v. *Georgia*, 2 Dallas 419 (1793). The eleventh amendment alters that part of Article III dealing with suits between a state and citizens of another state. It is my considered judgment that Congress was correct in the 1790s--

and, therefore, that Section 2 of S. 158 cannot pass constitutional muster.

3. One other point on the power of Congress to define constitutional personhood. The second paragraph of Section 1 of S. 158 could be construed to cast doubt on the now-settled constitutional doctrine that corporations are constitutional persons. Before 1886, that was not so. In fact, the first cases interpreting the fourteenth amendment saw the Supreme Court refusing to accord corporations the status of persons. In 1886 the Court changed its mind. Since that time, three Justices--Hugo Black, William Douglas, and William Rehnquist--are on record, in dissenting opinions, that the 1886 ruling was wrong and should be reversed. I believe that S. 158 would lend support to the view now held by Justice Rehnquist. See First National Bank v. Bellotti, 435 U.S. 765 (1978), at page 828 (Rehnquist, J., dissenting). By no means is a corporation a "human being" within the terms of S. 158; and I should think that the business community of the nation would, if the bill were called to their attention, be unhappy with its wording.

4. Now, as to the wisdom of this bill. This is a matter which cannot be separated from the power of Congress. As a beginning permit me to call your attention to an editorial in the Miami Herald (copy attached), entitled "Absurd Definition of Person." I should like to state my complete agreement with this editorial. S. 158 poses grave problems and will produce a host of cases trying to interpret it. Whatever one's attitude is toward abortion, this statute is not the way to proceed. It is an "uncommonly silly" bill--to employ the language of Justice Stewart on Connecticut's unconstitutional statute on contraception. The Herald indicates some of the many questions that arise when one considers the impact of the bill.

5. With all this in mind, let me state unequivocally and without reservation that S. 158 is unconstitutional for the reasons given above; and also that it is unwise to the point of sheer absurdity.

6. Should you wish me to expand on any of these matters, please call on me.

Arthur S. Miller
Professor Emeritus of Constitutional Law
George Washington University
Washington, D.C. 20052

As from: 1106 Fleming Street
Key West, Florida 33040

Attachment

Absurd Definition of Person

THIS week a subcommittee of the U.S. Senate Judiciary Committee is scheduled to hear testimony on a bill that would define a fetus as a "person" from the moment of conception. "Personhood" presumably would confer upon the fetus the Constitutional right to life, liberty, property, due process, and equal protection of the laws.

Clearly the intent of the proposal is to overrule the wisdom of the Supreme Court's abortion rulings by statute instead of Constitutional amendment. Its impact would be much greater, however, than simply outlawing abortion. It would elevate abortion — even in the first week of pregnancy — to the same criminal category as premeditated murder. Only the most-fanatic anti-abortionists accept that equation. Few other Americans would impose life imprisonment for the doctor and woman who conspire to end a pregnancy.

Even apart from the extreme penalties that the "personhood" bill would invoke, the ploy violates both common sense and Western tradition in another way. It attempts to confer upon a fertilized egg an artificial status as a full member of society. That status does not exist and has not.

An early miscarriage, for example, traditionally does not call for an autopsy. It is not recorded in the family Bible or in population reports. A fetus so lost is not announced by the family in church or in a published death notice. No funeral is held. To the contrary, an unsuccessful first-trimester pregnancy rarely is known to any but the woman, her husband, and perhaps a few adult relatives.

In defining U.S. citizenship, the Fourteenth Amendment declares, "All persons born or naturalized . . . ." Clearly the authors did not contemplate citizenship for the unborn. They did not write, as they might have, "All persons conceived or naturalized . . . ."

There is no end to the legal mischief that fetal "personhood" would inspire in this litigious society. Inheritance claims on behalf of fetuses never born are only one category. Product liability suits are another. And if suits can be filed on behalf of a fetus, can it be sued in turn? Must it pay taxes?

If a fetus is a person, how is an individual's legal age to be determined? What about entitlement rights under welfare, food stamps, pension plans?

The point of absurdity is reached quickly in the continuum the archconservative senators seem determined to pursue. The simple fact is that, whatever one's attitude toward abortion, a fertilized egg simply is not a person. Congress should not even consider the irrational step of declaring it to be one.

MIAMI HERALD
APRIL 1981

New York University
A private university in the public service

School of Law

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Telephone: (212) 598-3608

William E. Nelson

To: Senator Max Baucus

From: Professor William Nelson

Re: Is a Fetus a Person within the Intendment of the Fourteenth Amendment

Date: June 4, 1981

I can best address the question whether the framers of the Fourteenth Amendment intended to include fetuses within the term person as used in section one by summarizing my general view of the legislative history of the section.

Section one was not the most important part of the Fourteenth Amendment in the minds of its framers, Sections two, three, and four - dealing with issues of Southern representation in the House of Representatives, disenfranchisement of former rebels, and payment of war debts - were seen as more important.[1] But section one did generate debate on three important issues: whether blacks should be entitled to vote, whether segregation should be outlawed, and whether the Bill of Rights should be applied to the states. Different factions within the Republican coalition that guided the amendment through Congress responded in opposite ways to these issues, with more radical Republicans wanting to give blacks the vote, to end segregation, and to make states obey the Bill of Rights and with more moderate Republicans in disagreement.[2]

Republicans never resolved their differences over section one because it was not important for them to do so. The other sections of the Amendment resolved the questions that demanded immediate attention in 1866; the less pressing questions raised by section one could be postponed for future resolution. One purpose of the Amendment was to serve as a platform for Republicans in the 1866 Congressional elections,[3] and it was important not to divide the party over secondary issues that need not be decided. Indeed, Republicans with different views and constituencies found the ambiguity of section one helpful since they were able to mould its meaning to fit the politics of the constituency in which they were running in 1866 for election.[4] Historians and Supreme Court Justices who have sought unambiguous meaning in section one have found contradiction[5] instead because that is what the framers of the Amendment left. Sound reasons having to do with practical electoral politics and with their ability to get the Fourteenth Amendment through Congress led Republicans to leave a good deal of ambiguity in section one.

Given the failure of the framers of the Fourteenth Amendment to resolve questions about voting rights and segregation that were closely linked to the central questions of Reconstruction, it would be surprising if they had had any definitive intention about whether to include fetuses as persons within the meaning of section one. I am not aware, indeed, that any of the framers ever explicitly discussed the issue. Further evidence that the issue of fetuses was not at the surface of consciousness in 1866 and hence was left unresolved by section one lies in the fact that many states at the time permitted abortions prior to quickening[6] and there was little, if any, contemporary awareness that such abortions would constitute a deprivation of life under the newly enacted Amendment.

I have not completed my research on the enactment of the Fourteenth Amendment, and accordingly I may have missed occasional statements about fetuses. But I do know enough about the history to be confident that the 39th Congress did not definitively resolve the issue whether fetuses are persons within the meaning of section one.

Since the framers of the Fourteenth Amendment in general had expansive notions of Congressional power, it would be consistent with their views for the present Congress to eliminate the ambiguity in section one by defining the word "persons" to include or not to include fetuses, or alternatively, to leave the word undefined. The history of the Fourteenth Amendment's adoption precludes none of these options. The scope of Congressional power to enforce section one of the Fourteenth Amendment through section five depends more on contemporary practice than on history. I find so much ambiguity in sections one and five that I see them as a potentially unlimited source of federal legislative power.

The Fourteenth Amendment, as its opponents feared, has the capacity to obliterate the federal system, and every successful assertion of Congressional power under section five is one further step in that direction.

My conclusion, therefore, is that while Congress has the power to define the meaning of the word "persons" in section one, any effort to do so would tend to weaken the little that remains of federalism in the American political system. I am also convinced that paragraph 2 of section one of the proposed bill is inconsistent with the legislative history of section one insofar as it seeks to suggest that the 39th Congress intended to define persons to include human beings. If a bill is to be passed, it would better rest on a naked exercise of Congressional power than on implausible findings of fact.

1. See generally Joseph B. James, *The Framing of the Fourteenth Amendment* (Urbana, Ill., 1956).

2. On voting rights, compare *Cong. Globe*, 39th Cong., 1st. Sess.2510 (1866)(remarks of Cong. Miller), and ibid., 2766 (remarks of Sen. Howard), with ibid., 2532 (remarks of Cong. Banks), and ibid., 2963-64 (remarks of Sen. Poland). See especially the curious statement of Rep. Bingham in ibid., 2542, discussed in *Oregon v. Mitchell*, 400 U.S. 112, 264-67(1970)(opinion of Brennan, White and Marshall, JJ.). On segregation, the conflicting statements are noted in Alexander M. Bickel, "The Original Understanding and the Segregation Decision," 69 *Harv. L. Rev.* 1 (1955). On the applicability of the Bill of Rights to the states, compare the evidence set forth by Justice Black in *Adamson v. California*, 332 U.S. 46,68 (1947)(dissenting opinion), with that in Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 *Stan. L. Rev*. 5 (1949).

3. See James, *Framing of Fourteenth Amendment*, 147, 169-73.

4. See the evidence collected in *Oregon v. Mitchell*, 400 U.S. 112, 272-74 (1970)(opinion of Brennan, White, and Marshall, JJ.).

5. For some illustrations of the contradiction and ambiguity, see the materials cited in note 2 supra.

6. See James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 200-25 (New York, 1978).

1429 Jackson St.
Missoula, MT.
59801
May 14, 1981

1981 MAY 19 AM 10 54

Senator Max Baucus
1107 Dirksen Office Bldg.
Washington, D.C. 20510

Dear Max,

You have asked the faculty here for their views on the Helms bill. I simply lack the time right now to do the research on the jurisdiction-removal issue (I presume Tribe, et al have already done a job on it and have written them for copies of what they've sent the Senate, with the thoght of possibly doing some follow-up research based upon their work). However, it seems to me that one should not lose sight of the fact that the central issue here is still the abortion question. Helms, et al shouldn't try to kid anybody on that score. And on that score, we know full well what the males on the state legislatures have done when given the "freedom" to legislate in this area--history shows that they have passed a wide variety of laws, each screwier than the next, which seek to make CRIMINAL what about 70% of the American people believe should be left a matter of individual conscience.

Since the real question, in short, is the issue of abortion rights, I have enclosed a copy of a petition signed by eleven of the faculty here and presented to the last Montana legislature. The central point of it is that CRIMINAL sanctions are utterly inappropriate to enforce something as to which a) there is a serious split of opinion, b) on a very serious matter. Unlike the split re marijuana possession, the right to smoke a damn weed simply does not begin to approach the seriousness of the claim of a woman who does not wish to have a compelled pregnancy under penalty of a criminal conviction. In fact, even if the "seriousness" of that claim is not (as the Supreme Court said it was, in Roe v. Wade) of constitutional dimension, it is certainly sufficiently serious (albeit there are admittedly very serious claims raised on the other side) to make it unwise and improper to attach criminal sanctions.

The above views arise in part out of my fundamental pro-choice beliefs, but also out of my experience as a prosecutor and as a legal scholar who has studied the nature of criminal law for over a decade now. Ordinarily there is almost universal consensus on what should be criminal, and this is as it should be when society decides to brand somebody as a criminal. Thus, there is universal agreement as to the propriety of making rape, robbery, and burglary criminal; nobody lobbies the legislature to make them non-criminal. Even as to speeding laws, there is a broad consensus that such laws should exist, even though each of us may occasionally speed and there may be some dispute as to where the limits ought to be. But nothing approaching this desirable kind of consensus exists in regard to abortion.

Thus, any action which would have as a practical consequence the allowance of state laws criminalizing abortion should be resisted mightily.

Sincerely yours,

Jim

James T. Ranney
Research Assoc. Professor of Law

P.S.: I appreciate, from what I've read in the newspaper, your actions thus far on the Helms bill hearings.

PETITION

We, the undersigned, respectfully submit the following for the consideration of the Legislature, in particular, the House Judiciary Committee:

First, the attempt to criminalize abortion will not in fact stop abortions, but only increase the number of dangerous illegal abortions or other unsafe methods of terminating a pregnancy or the number of suicides;

Second, and more importantly, regardless of one's view of the morality of abortion from a personal standpoint or a social-moral/philosophic-religious standpoint, the effort to make such conduct CRIMINAL is misguided and wrong, for it is highly improper to attempt to enforce a criminal law when there is a serious split of opinion as to such a serious question, leading to such problems as nonenforcement or, worse, selective (i.e., discriminatory) enforcement, all of which creates disrespect for the law.

We, therefore, the undersigned, do strongly oppose the passage of HJR15 for the reasons stated above, and because it is a very dangerous measure totally apart from the above reasons, since it threatens to rend, and very possibly destroy, a constitutional fabric which is the creation of centuries of work and the envy of nations throughout the world.

James T. Ramsey
Albert W. Stone
Lester R. Rusoff
Patterson
Noel E. Larrivee
Larry M. Elison
Carl W. Tobias
Margery H. Brown

New York University
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Professor David A. J. Richards

1981 APR 28 AM 9 38

April 22, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

In response to your inquiry to me of April 13 regarding my assessment of whether or not the Congress has the authority under Section 5 of the 14th Amendment to enact Section 1 of S. 158, my considered view is that the proposed statute would be an unconstitutional contraction of the constitutional rights established in Roe v. Wade and its progeny. In my view, the forms of fact-finding, which are alleged to justify S. 158, are not, properly understood, the kind of Congressional investigation which can justify an expansion of constitutional principles beyond those established by the Supreme Court. Indeed, no facts about the biology of foetal development, certainly none offered in support of S. 158, can alter the constitutional judgment enunciated in Roe v. Wade, namely, that the criminalization of abortion in the early stages of pregnancy cannot be justified consistent with the constitutional values of the privacy rights of women. The Supreme Court's judgment rests on an interpretation of constitutional values, which no amount of putative fact-finding by Congress can here--consistent with Marbury v. Madison--undercut.

Yours truly,

David A. J. Richards
Professor of Law

DAJR/DP

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW
Office of the Dean

435 West 116th Street

1981 APR 28 AM 9 39

April 24, 1981

Hon. Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing in response to your inquiry as to my views of the constitutionality of Section 1 of S.158.

This provision appears to be an attempt to overturn a Supreme Court decision on constitutional rights by a mere act of Congress as distinguished from a constitutional amendment, and therefore clearly invalid.

I recognize that the Supreme Court had stated, by way of an alternative ground for its holding in Katzenbach v. Morgan, 384 U.S. 641 (1966), that Congress may extend constitutional rights under the 14th Amendment beyond those found by the courts, pursuant to its power to enforce that amendment under Section 5. In response to a challenge in Justice Harlan's dissenting opinion, it was made clear in the majority opinion that this power could be used only to extend, and not to contract, constitutional rights. While this bill purports to create a new constitutional right, it does so at the expense of curtailing an existing one previously upheld by the Supreme Court in Roe v. Wade and a host of subsequent cases. There was no suggestion in Katzenbach v. Morgan or any other Supreme Court decision that the power to enforce the 14th Amendment can be twisted to take away a 14th Amendment right, and every indication in Katzenbach v. Morgan that this would be forbidden.

I want to point out that I am writing only as an individual and not expressing any institutional opinion of Columbia Law School.

Sincerely yours,

Albert J. Rosenthal

WBA
Women's Bar Association
11 Beacon Street Suite 605
Boston, Massachusetts 02108

'81 JUN -1

June 1, 1981

Senator Max Baucus
U.S. Senate
Washington, D.C. 20510

Dear Senator Baucus:

I am writing on behalf of the Women's Bar Association of Massachusetts, a professional organization of more than five hundred attorneys, to express our opposition to S.158/H.R.900, which has been referred to as the "human life" statute. In our view it is one of the most dangerous and clearly unconstitutional legislative proposals ever to be entertained by Congress.

This legislation represents totalitarianism of the most extreme sort, intruding into the most sacred area of human life -- marriage and the family. It is contrary to both the traditional tolerance of a democratic society for different opinions and life choices, and the republican tradition of respect for individual choice and freedom from government regulation. This particular bill governmentally mandates forced childbearing by millions of Americans. In its imposition of one philosophical and religious view upon all of society, it is in principle no different from the mandating of birth control or of euthanasia.

As attorneys, we wish to emphasize the profound constitutional separation of powers violation that this statute entails. The bill is assuredly unconstitutional insofar as it purports to overrule a decision of the United States Supreme Court interpreting the Fourteenth Amendment. It sets a dangerous course in attempting to divest lower federal courts of jurisdiction to enforce the Bill of Rights.

The WBA's membership has overwhelmingly supported the right to choice in matters of family planning. Despite the use of the term "moral majority", I do not believe that the majority of Americans support the idea of Government dictation of personal action in this area. And despite the term "right to life", the proposed bill would discount the rights of American women to health and to life by simplistically treating a complex, sensitive and individual question.

We urge that this bill be defeated in committee. It is unworthy of serious consideration by our elected representatives.

Sincerely,

Terry Jean Seligmann

Terry Jean Seligmann
President

TJS:mls

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

1981 MAY 12 AM 9 33

May 7, 1981

Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This will acknowledge your letter of April 29, 1981, requesting my opinion on the constitutionality of bills such as S. 158 and H.R. 900, which undertake to define "person" as used in the Fourteenth Amendment to the Constitution as including the human fetus from the moment of conception. It is understood that the purpose of these bills is to override the Supreme Court's rulings in Roe v. Wade, 410 U.S. 113 (1973) and subsequent decisions based on the principles of that case. Since those decisions are based on the Constitution itself, it appears that the purpose of these bills is to bring about a change in the scope and effect of the relevant Constitutional provisions by statutory means, rather than by amendment of the Constitution in accordance with the procedures prescribed in Article V.

The bills in question rely explicitly on the power of Congress under Section 5 of the Fourteenth Amendment as the constitutional basis of their provisions. The scope of this power, during the last fifteen years, has been the subject of at least four significant Supreme Court decisions. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); Rome v. United States, 446 U.S. 156 (1980); see also Fullilove v. Klutznick, 448 U.S. ___ (1980). In all these cases except the first, the Court was divided in opinion on the governing principles, and professional comment on the problem has reflected its controversial nature.

Despite this division of opinion, I believe it to be clear that the bills in question are unconstitutional. The majority opinion in the Morgan case goes further than any other in giving scope to Congressional power under Section 5 of the Fourteenth Amendment, but in that opinion it was categorically stated that Section 5 gives Congress no power "to restrict, abrogate, or dilute" constitutional guarantees. Katzenbach v. Morgan, 384 U.S. at 651 n.10. There can be no doubt that the purpose and purport of the bills in question is to "restrict, abrogate, or dilute" the constitutional rights of pregnant women as established in Roe v. Wade.

As for the members of the Court who do not share the expansive views of Congressional power under Section 5 articulated by the majority in the Morgan case, it is my belief that, regardless of their agreement or disagreement with Roe v. Wade, they would conclude that the constitutional principles it established cannot be nullified by statutory action.

For the foregoing reasons, stated above in summary form, it is my opinion that the bills you have called to my attention are unconstitutional.

Sincerely yours,

Telford Taylor
Nash Professor of Law, Emer.

TT:el

KAY F. THOMAS
ATTORNEY AT LAW
8250 SMITH ROAD
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398-4766

April 27, 1981

Ranking Minority Member
Senate Judiciary Subcommittee on Separation of Powers
United States Senate
Washington, D. C.

Re: S. J. Res. 17

Dear Senator:

I understand that your subcommittee of the Senate Judiciary Committee is in process of considering various statutes, such as S. 158 which declares that "human life shall be deemed to exist from conception," and in effect purports to define "life" for purposes of the 14th Amendment guarantees to due process and equal protection of the laws.

I strongly urge you to vote against reporting out any form of the so-called "Human Life Bill" to the full Senate. These bills not only would prohibit abortion but would also prohibit two of the most popular forms of birth control--the I.U.D. and those forms of the birth control pill which prevent the implantation of the fertilized egg on the walls of the uterus. I also strongly urge you to vote against any form of compromise bill which would generally prohibit abortion but create exceptions for victims of rape/incest and to preserve the life of the mother.

The principle behind all of these bills, with or without exceptions to make them more palatable to the electorate, is the same--they in effect elevate the human fetus to the status of a "person" under the United States Constitution, thus arguably entitling the fetus to equal or perhaps greater rights than the woman in whose body it resides. The passage of any so-called "Human Life Bill" would have a far-reaching, negative effect on the personal reproductive choices of all Americans and would force upon all of us the religious belief that "life" begins at the point of conception. For the latter reason alone, I believe that any such bill would ultimately be stricken down as contrary to the First Amendment's guarantee of freedom of religion.

The so-called "Human Life Bill" also proposes a flagrant increase in Government control over the lives of all Americans--women and men--and is totally antithetical to the current Administration's campaign to reduce Government interference in the lives of American citizens.

For all of the above reasons, the "Human Life Bill" does not deserve your support, and I strongly urge you to vote against reporting any form of such bill to the full Senate for consideration.

Sincerely,

Kay F. Thomas

Kay F. Thomas

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Professor of Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

April 24, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your inquiry of April 13, 1981, about my assessment of whether Congress has the authority under Section 5 of the Fourteenth Amendment, or otherwise, to enact Section 1 of S.158. Although I would be glad to elaborate if you wish, a brief answer is possible since I think it absolutely clear that Congress has no such authority.*

Neither *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), nor any other *Supreme Court decision*, empowers Congress to redefine the basic meaning of such terms as "life" or "person" as those terms are used in the Bill of Rights and the Fourteenth Amendment. Moreover, even if Congress could find affirmative authority for such redefinition in Section 5 of the Fourteenth Amendment or elsewhere, its exercise of such authority would certainly be subject to the Bill of Rights -- and the Supreme Court has ruled unequivocally and repeatedly that if a "theory of life" is invoked to "override the rights of the pregnant woman," then her "liberty" has been denied without "due process of law," *Roe* v. *Wade*, 410 U.S.

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* *See also* J. Ely and L. Tribe, "Let There Be Life," *N.Y. Times*, *March 17*, 1981, p. A 17; L. Tribe, "The Supreme Law is Still the Constitution," *N.Y. Times*, April 20, 1981, p. A 18; Letter to Members of the *Senate Judiciary* Committee, April 21, 1981, from Paul Brest, John Hart Ely, Paul A. Freund, Erwin N. Griswold, Louis Henkin, Philip B. Kurland, Louis Schwartz, Telford Taylor, Laurence H. Tribe, William Van Alstyne, Harry H. Wellington, and Charles Alan Wright.

113, 162 (1973) -- a result Congress is forbidden by the Fifth Amendment to cause, no less than the states are forbidden by the Fourteenth Amendment to do so. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

The opposite approach could not be confined in any principled way to cases in which the judiciary has candidly confessed an inability to give determinate meaning to constitutional terms like "life." For when Congress acts to override, or to invite State Legislatures to override, the "liberty" of pregnant women, it does not merely "inform the judiciary," in the words of Senator Hatch (Cong. Rec., April 10, 1981, p. S3913), of its legislative findings. Congress is empowered only to make laws, not to lobby or advise the courts. And if a law made by Congress can redefine terms in this one area so as to entrust to majority vote a matter that the Supreme Court has held individuals entitled to resolve for themselves, then Congress has equal power to effectuate such a divestment of individual rights in other areas as well -- regardless of the Supreme Court's degree of confidence or perplexity.

At stake therefore is not simply an attack on the Supreme Court's abortion ruling but an attack on the binding effect of the Constitution, as construed by the Court, upon those whom the people elect to public office -- those whose oaths to uphold the Constitution as the supreme law of the land can be enforced in no other way than through Supreme Court review.

In all candor, I must confess to no small dismay at the cynicism of those lawmakers who pledge allegiance to our most hallowed traditions but then ally themselves with efforts to circumvent the Constitution's rules, in Article V, for proposing and ratifying amendments -- secure in the knowledge that, when the Supreme Court predictably discharges its duty to declare such circumvention flatly unconstitutional, these same lawmakers will be able to denounce the Imperial Judiciary and thereby win added support for the constitutional amendment that they find themselves unable, without such evident manipulation, to persuade the country to adopt.* If such lawmakers are truly being as manipulative as it appears, they should be ashamed of themselves. If they are instead acting in good faith, their constitutional naivete is staggering.

Yours truly,

Laurence Tribe

Laurence H. Tribe
Professor of Law

LHT/cad
cc: Congressman Don Edwards
Chairman, Subcommittee on Civil and
Constitutional Rights
House Committee on the Judiciary

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* Indeed, even on the merits it seems strange, to say the least, that proponents of a right-to-life amendment or of this legislative short-cut profess an unswerving dedication to the right to life of all the innocent unborn while insisting with equal fervor on the right of the several states to decide, one by one, just which unborns to save through a ban on abortion and which unborns to remit to the care of women and their doctors under the regime of personal choice.

UNIVERSITY OF WISCONSIN-MADISON

LAW SCHOOL
Madison, Wisconsin 53706

April 20, 1981

The Honorable Max Baucus
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator Baucus:

In response to your letter of April 13, I address the question of Congress' authority to enact section 1 of S.158. As a preliminary, I note my qualifications: after being graduated in 1971 from the Yale Law School, where I was an editor of the Yale Law Journal, I served as a law clerk for two years, first to Judge George Edwards, currently Chief Judge of the Court of Appeals for the Sixth Circuit, and then to Justice Thurgood Marshall of the United States Supreme Court. After that I began teaching at the University of Wisconsin Law School, where I have specialized in constitutional law and the law of federal courts, subjects about which I have written extensively. I also note that in the time available I have been unable to do comprehensive research on the issues raised by S.158, and draw primarily on my general knowledge and understanding of the Constitution.

I begin by clearing some ground. Like Glendower, Congress can call the spirits from the vasty deep; the question is what effect a congressional declaration has on what S.158 characterizes as a scientific question. (I recall, for example, the possibly apocryphal legislation declaring that the mathematical quantity "pi" equalled three.) But of course the issue addressed in S.158 is not a scientific or technical question. It is primarily if not exclusively a moral question, as Justice Blackmun's opinion in Roe v. Wade acknowledged. (See, e.g., 410 U.S., at 159, referring to the views of those "trained in . . . medicine, philosophy, and theology.") This does not resolve any of the questions posed by S.158, for Congress may perhaps be a more authoritative source of moral guidance than state legislatures or the courts. It does, however, reduce the plausibility of relying on that portion of Katzenbach v. Morgan that refers to Congress' special ability to determine facts.

Second, and far more important, it is entirely unclear that the declaration in S.158 is inconsistent with the analysis in Roe v. Wade and therefore that enacting S.158 would indeed authorize states to reenact restrictive abortion statutes (see 127 Cong. Rec. S.292, daily edition, Jan. 19, 1981). The Court in Roe v. Wade recognized the state's interest in protecting "potential" life, and accomodated that interest with the woman's interest in "privacy" to yield the result in that case. I find it hard to believe that the state's interest in protecting actual life is stronger than its interest in protecting potential life of the sort at issue in Roe v. Wade.

I certainly know of no credible moral arguments to that effect. If I am correct, S. 158 if enacted would not alter the balance that the Court struck in Roe v. Wade.

I turn now to the question of congressional authority. The Constitution has a structure in which plenary power is granted to Congress and then is restricted by specific limitations on the exercise of the power granted. By "plenary," I mean that the grants of power, including section 5 of the Fourteenth Amendment, taken by themselves authorize Congress to act on any subject reasonably related to the power. Katzenbach v. Morgan was in this sense an unproblematic decision: eliminating English literacy tests was reasonably related to enforcing the equal protection clause.

Superficially S.158 resembles the statute in Katzenbach v. Morgan, for in S.158 Congress would make a declaration that was reasonably related to enforcing the due process clause. But that analysis is incomplete because it fails to take account of the limitations on Congress' power. In Katzenbach v. Morgan the asserted limitation was federalism. Katzenbach held, and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), reiterated, that federalism placed no limits on Congress' power under section 5 of the Fourteenth Amendment, which by the terms of section 1 limited state authority. But Katzenbach v. Morgan's holding does not advance the analysis of S.158, because the relevant limitation here is not federalism but the right of privacy found either in the due process clause of the Fifth Amendment or in the Ninth Amendment.

Footnote 10 of Katzenbach v. Morgan does advance the analysis. There the Court affirmed the proposition that Congress' plenary power under section 5 could not be exercised so as to dilute the guarantees of the due process and equal protection clauses. That is, the section 5 power, like all others, is limited by the individual rights provisions found elsewhere in the Constitution. Consider now the situation if S.158 is enacted and a state adopts a restrictive abortion law. The restrictions would be challenged as violating the rights protected in Roe v. Wade. The state would defend its restrictions as authorized by the Fourteenth Amendment as interpreted in S.158. The challengers would respond that, to the extent that S.158 purported to authorize such legislation, it was unconstitutional because it violated their rights as interpreted in Roe v. Wade. In analyzing that response, the Court would have to define the contours of the claimed rights. Specifically, it would have to balance the woman's interest against the state's interest in protecting life. If the woman's interest was weightier, S.158 would be unconstitutional. I have already suggested that simply transforming an interest in protecting "potential" life into one in protecting "actual" life is unlikely to affect the way the balance is struck. On this analysis, S.158 is not so much unconstitutional as it is ineffectual.

I hope this analysis is helpful. Please let me know if you have additional questions.

Very truly yours,

Mark Tushnet
Professor of Law

MT:jr

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SCHOOL OF LAW — POSTAL CODE 27706

1981 APR 27 AM 3 18

April 24, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I received your letter of April 21st today, asking me to comment on the constitutionality of Section 2 of S. 158 (which presumes to declare the meaning of the word "person" in the 14th amendment), and on the constitutionality of a subsequent section severely restricting the jurisdiction of the federal courts.

I fear we may have missed one another in the U.S. mail, because I had previously received a nearly identical letter from you dated April 13th, to which I replied at once. Nonetheless, on the chance that my response somehow went astray, I very much appreciate your inquiry and do wish to provide whatever assistance I can.

S. 158 appears to be identical to H.R. 900, a copy of which I received with a request from Donald Edwards in the House of Representatives. Enclosed is a copy of my reply to Representative Edwards. For reasons reviewed in that letter, I believe Section 2 is plainly beyond the constitutional power of Congress. For reasons elaborated in the latter part of the enclosed letter, I do not believe that it can be sustained upon any claim of power arising under Section five of the 14th amendment. Far from representing a proper application of _Katzenbach v. Morgan_, the draft provision reflects a misapplication, and serious misunderstanding, of that case.

I believe the power of Congress so to restrict the jurisdiction of the federal courts (including the appellate jurisdiction of the Supreme Court) to be a closer question which is genuinely complicated as well as difficult. But as I suppose that restriction, despite a severability clause, will simply become inoperative insofar as the substantive portions of the bill (_e.g._, Section 2) are held to be unconstitutional, I did not in my letter to Congressman Edwards take the necessary time to address this separate question. I regret that the press of preparing other testimony for congressional committees (including one which will consider, more generally, control of federal court jurisdiction by Congress), but it is truly awkward to attempt to share my reasons for professional doubts respecting the jurisdiction-suspending section of S. 158 in this letter. Should it remain an important issue, however, I would do my best to be of whatever help I can.

Please do let me know if the enclosed copy of my letter to Congressman Edwards is not sufficient. I very much appreciate your concern with this bill.

Sincerely,

William Van Alstyne

William Van Alstyne

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW
POSTAL CODE 27706

1981 APR 27 AM 9 18

March 31, 1981

The Honorable Don Edwards
Chairman, Subcommittee on Civil and Constitutional Rights
The United States House of Representatives
Washington, D. C. 20515

Dear Mr. Edwards:

H. R. 900 is both unconstitutional and wholly unworthy of Congress. Its presuppositions respecting the power of Congress to impose its own definitions upon words in the Constitution are naive and incorrect. Its additional presumptuousness in attempting to revive criminal statutes already adjudicated by the Supreme Court as violative of fundamental personal rights is unprecedented and unsound. I shall elaborate briefly on both these points. I shall be pleased to provide any additional assistance to you in your further consideration of this foolish bill.

The abortion decisions of 1973 do not mark the first occasion when a constitutional adjudication by the Supreme Court has met with very great resistance. As early as 1793, an interpretation of Article III subjected states to law suits in federal courts contrary to what many widely believed could not be done without the consent of such states. The case was *Chisholm v. Georgia*, 2 U.S. 519, and it was subsequently overturned by the provisions of the Eleventh Amendment in 1794. A little more than a half-century later, the Supreme Court interpreted the word "citizen" in Article III to exclude a number of persons whom many (including a minority on the Supreme Court itself) believed to be capable of acquiring that status. The case was *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and it was subsequetly overturned by the provisions of the Fourteenth Amendment in 1868. Thirty years later, the Supreme Court interpreted the phrase "direct taxes" in Article I to include a tax on income derived from the rental of real estate, contrary to the different interpretation of the same phrase by Congress (and by a minority of the Court itself). The case was *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895). It was subsequently overturned by the Sixteenth Amendment in 1913, which permitted the unapportioned taxation of such income. And as recently as 1970, contrary to Congress's own interpretation of "equal protection," a majority of the Supreme Court held that the disfranchisement of citizens over eighteen years of age (but less than twenty-one years of age) in all state and local elections was not within any corrective power of Congress pursuant to Section 5 of the Fourteenth Amendment. That outcome, too, was also overturned -- by ratification of the Twenty-Sixth Amendment in 1971.

In each of these (and many other) instances, final adjudications by the Supreme Court have involved interpretations of words or phrases in the

Constitution different than the interpretation imputed to the same words by state legislatures or by Congress. In the vast majority of instances, the adjudicated interpretation by the Supreme Court continued to be controlling, despite dissatisfaction by others who believed that interpretation to be unsound. That observation correctly characterizes even the single most famous (and important) decision in our entire constitutional history, the case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In part, that famous case involved the issue whether Congress could enlarge the original jurisdiction of the Supreme Court by adding into its original jurisdiction some cases that might otherwise reach the Court only on appeal. The language of Article III itself is wholly inconclusive, and an eminently reasonable argument could be made that while Congress might not have power to limit or to reduce the original jurisdiction of the Court, it could most certainly enlarge that jurisdiction by adding such cases as were otherwise within the judicial power: cases that Congress believed to be sufficiently important that they, too, should also commence in the Supreme Court itself. Chief Justice Marshall held otherwise, however, and--there being no amendment ever made to the Constitution to change that result--that remains the case even now.

Marbury v. Madison, and Martin v. Hunter's Lessee, concretely established two propositions which are themselves the essence of the American constitutional system. The first is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of Congress, which is final. The second is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of state legislatures or state courts, which is final.

In keeping with these bedrock principles, it is perfectly well understood that the finality of those Supreme Court interpretations are reversible by two means only. The first is the capacity of the Court to overrule iself. The second, as illustrated by the Eleventh, the Fourteenth, the Sixteenth, and the Twenty-Sixth Amendments, is to "overrule" the Court by amending the Constitution.

The technique of H. R. 900 is not to propose an amendment. It betrays a complete lack of confidence that the constitutional demands for two-thirds majorities in both houses, and ratification by three-fourths of the states, could be obtained to that end. Thus, in repudiation of the provisions of Article V that nothing less than these extraordinary majorities may suffice authoritatively to displace a final adjudication by the Supreme Court respecting the adjudicatory significance of a part of the Constitution, it presumes instead to instruct the Court on the "right" meaning of a particular word. This attempt is as futile (and improper) as though Congress, following the decision in Marbury v. Madison, had presumed to adopt a law in which Congress "finds" that Article III "was intended to" permit some cases to be added to the Court's original jurisdiction which cases might otherwise come only within its appellate jurisdiction. It is as futile as though Congress, following the decision in Chisholm v. Georgia, had passed a law in which it "found" that Article III did not intend to permit states to be sued in federal courts without their consent. It is exactly the same as though Congress, after the decision in Pollock v. Farmer's Loan & Trust, had adopted a statute in which "Congress finds that the phrase 'direct taxes' in Article I was not intended to include a tax on income derived merely from the rental of real estate." Indeed, if this technique were available to Congress, in no instance would amendments to the Constitution be required authoritatively to alter the Supreme Court's interpretations of the Constitution. As you (and every member of Congress) are well aware, however, our system of constitutional government, unlike that of many other nations, is not one of parliamentary supremacy. It is not the case that we are under a Constitution, but the Constitution is what Congress says it is. A Constitution so construed cannot act as a positive law restraint upon Congress or upon the States. Rather, a Constitution so construed would permit Congress not merely to control the scope of the Fourteenth Amendment, but to define its own powers, to override all reserved state powers, and to demolish the separation of powers as well--all by the breathtaking expedient of having Congress bind the courts by presuming to "find" what every part of the Constitution was "intended" to do.

We come, then, to H. R. 900. In Roe v. Wade, the Supreme Court held that the word "person" as it appears in the Fourteenth Amendment is exclusive of gestating fetuses prior to the time of fetal viability. H. R. 900 presumes to "find" that the word "person" in the Fourteenth Amendment, to the contrary, includes not merely viable but unborn fetuses but, indeed, embryoes, blastulas, and zygotes as well. Presumably, it means to "find" that the instant there is sufficient contact between a sperm and an egg as to produce any preliminarry reaction whatever, and certainly at least telophase (the last step in mitosis in simple cell division), the chemical reaction at the least discernible preliminary step dates a "person" for all Fourteenth Amendment purposes.

Having discovered in the Fourteenth Amendment (?) a definition of "person" contradictory of the Supreme Court's interpretation, Congress then proposes to use that finding to validate state laws already held to be violative of another person's fundamental right as previously determined by the Supreme Court. It is, of course, the holding of Roe v. Wade that no state may criminalize a woman's decision to terminate an unwanted pregnancy within six months of conception, assuming only that she secures the assistance of a competent physician who, in assisting her, complies with reasonable medical procedures. That freedom is described by the Court as "fundamental." Nothing, in any of the subsequent decisions of the Court, reneges on that description. The ambition of H. R. 900 is not to support that freedom, or even to assist such women carrying fatally malformed fetuses, or women for whom pregnancy may be threatening to their health. To the contrary, in prior versions of the "Hyde Amendment," Congress has already set a cruel determination against such women by restricting any such assistance and by rendering, for them, even first-term, medically-indicated abortions subject to private charity and to the commercial market alone. The Supreme Court has found no adequate constitutional basis to forbid this selective vindictiveness. But I see no evidence at all that it will be impressed by Congress's cellophane effort to do indirectly (by defining words in the Constitution) what it cannot do directly (to reverse substantive constitutional decisions by the Supreme Court).

If Members in Congress frankly desire to compel the birth of every fertilized ovum, or if Members in Congress think it wise that each state be allowed to criminalize whatever abortions, in whatever circumstances they wish to criminalize, they may do so. For even freedom of speech may be ended in this country by amending the Constitution itself (to permit the criminalizing of free speech), and so, too, may any other fundamental freedom we have. But the very purpose of Article V is to disallow such changes without the sobering check that the amendment process itself imposes. And it behooves Congress to respect that process in this instance, at least as much as it did in the establishment of an income tax.

I have not devoted any time in this brief letter to an "analysis" of *Katzenbach v. Morgan*, and the various (even conflicting) impressions which that case has generated. I will say briefly, however, that I know of no reasonable manner in which the sound foundation of that case can be adjusted to sustain what is being proposed in H. R. 900. The basic thesis of *Katzenback v. Morgan* is not complicated. That thesis is that Section One of the Fourteenth Amendment committed to the judiciary the obligation to hold invalid such state statutes as were clearly, in the Court's own view, forbidden by the Fouteenth Amendment. These, in brief, were all laws forbidden by Section One in its self-executing effect, laws so clearly (in the Court's view) in derogation of privileges and immunities, life, liberty, and property, or in derogation of equal protection, that they are invalid whether or not Congress has seen fit to say so. It is Section One, in its self-executing effect, which is the foundation of *Roe v. Wade*.

Section One was drafted to provide this minimum self-executing effect, moreover, partly because it was agreed in the 39th Congress (which proposed the Fourteenth Amendment) that it was unwise to leave the determination of invalid state laws merely to Congress. The original version of the Fourteenth Amendment did just that, providing only what Congress might do in respect to certain kinds of state laws, but not providing any security against state laws that Congress might not see fit to forbid. It was significantly to provide security against a remissness in Congress that the Fourteenth Amendment was redrafted (in its present form), so to make certain a self-executing effect, a minimum level of judicially-enforceable protection, irrespective of Congress's sentiment about such protection. Consistent with this understanding (which is consistent both with *Roe v. Wade* and with *Katzenbach v. Morgan*), it was also anticipated that Congress might (under Section five) reach some state laws that were not so clearly in violation of Section one as to require the courts to hold them invalid. And that, of course, is what happened in *Katzenbach v. Morgan* itself.

Ironically, a correct application of *Katzenbach v. Morgan* would be useful to sustain an Act of Congress very different from H. R. 900. For instance, although the Supreme Court has held that the due process clause does forbid any state from criminalizing medically safe abortions within the first two trimesters (a fundamental right that neither Congress nor the States may now attempt to override), it has not held that states are also constitutionally obliged to provide economically disadvantaged women any assistance for that purpose even if, without such assistance, their practical capacity to exercise their fundamental right is seriously prejudiced. Even the omission of medically-indicated abortions from a state medic-aid program otherwise assisting economically disadvantaged persons for medically-indicated services, has not been held by the Court as to be so utterly arbitrary as to be a *per se* violation of the Fourteenth Amendment. On the other hand, were Congress to regard such a differential treatment of women seeking medically-indicated abortions as plainly arbitary when the state otherwise has undertaken to extend assistance to economically disadvantaged persons, then I think *Katzenbach v. Morgan* would come into play. The unequal treatment of economically-disadvantaged women otherwise unable to secure medically-indicated abortions might plausibly be regarded by Congress as so discriminatory and unfair under the circumstances that Congress might, on that basis, forbid the states so to discriminate against women. In this respect, exactly as in *Katzenbach*, Congress would be acting to enhance a fundamental right, rather than to restrict or to annihilate it. *Katzenbach* does not contemplate this latter power. Neither does Section One of the Fourteenth Amendment. Rather, Section One establishes a judicially-ascertained, minimum floor of self-executing constitutional protection which neither Congress nor the states may violate. It was that "floor" that was held to be violated in *Roe v. Wade*. H. R. 900 is wholly in conflict with this proper understanding of the Fourteenth Amendment and is, accordingly, both unauthorized and invalid.

I realize that nonetheless the tendency in Congres to vote for bills such as this is very great. It may appease particular constituancies and divert all blame to the courts. But you have not been a Member of Congress to have looked at matters in this cynical fashion, and I am confident you will not do so on this occasion, either.

Sincerely,

William Van Alstyne
William R. Perkins Professor of Law

WVA:mjf

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1981 MAY -4 AM 10:54

April 29, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation
  of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of April 13, 1981, requesting my views on the constitutionality of the proposed statute.

I do not believe that a statutory declaration that life begins at conception would substantially alter the analysis of whether a woman should have the right to terminate a pregnancy. Whether or not a fetus is considered to be a life, pregnancy creates a unique situation in which the life of one person is completely dependent upon the life of another. Hence, the interests of the woman must be balanced against the very young fetus or pre-birth child. As the fetus (infant) gets older, s/he acquires greater and greater interests in continued existence vis-a-vis the mother. Although I find nothing constitutionally compelled in the line which has been drawn by the Supreme Court at the first trimester, the first trimester may be a suitable delineation of the period during which the woman's rights of self-determination, privacy, life, etc. predominate over the young person's.

Hence, I would reach the same result as the U.S. Supreme Court did in Roe v. Wade, although acknowledging that life begins at conception. Hence, this statute is quite unnecessary or irrelevant to an appropriate analysis of the problem.

I am concerned that this statute attempts to rely upon the legislative implementation provision of the Fourteenth Amendment to deprive people, in this case, women of their constitutional rights. While it could be argued that the legislature is attempting to protect the rights of pre-birth persons, they are thereby depriving women of their rights to control their lives and bodies. I doubt the U.S. Supreme Court would sustain a statute which would deprive blacks of their right to vote, employment, housing, etc. on the theory that it was increasing the constitutional rights of whites. There are limits on the capacity of the legislature under the enforcement provision of the Fourteenth Amendment to destroy the consitutional rights of one group under the guise of protecting the rights of another.

I have not carefully considered the jurisdictional limitation imposed by the statute and thus do not want to express a view on that part of the statute at this time. I'm sorry that I do not have the time to prepare a more elaborate and documented statement of my views, but I hope this letter will assist your deliberations.

Sincerely yours,

David Weissbrodt
Professor of Law

DW/ns

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1981 APR 30 AM 10: 49

April 28, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

Enclosed is the memorandum I referred to dealing with the Consequences of a "Human Life" Statute.

Sincerely,

David Westfall

David Westfall
John H. Watson, Jr.
Professor of Law

DW/eaf

Encl.

April 28, 1981

POSSIBLE CONSEQUENCES OF A "HUMAN LIFE" STATUTE OR CONSTITUTIONAL AMENDMENT IN AREAS OTHER THAN ABORTION

Statement of David Westfall, John H. Watson, Jr.
Professor of Law, Harvard Law School, Cambridge, Massachusetts 02138

Introduction

This statement analyzes the possible consequences of a "human life" statute or Constitutional amendment in areas other than abortion. Such effects are likely to include, in varying degrees, confusion and uncertainty in such unrelated areas of law as legislative apportionment and administration of local government, as well as in criminal law, where one would naturally expect a major impact from a new definition of "person" or "human life." In the law of property and estates the results would be nothing short of chaotic until myriad questions had been definitively resolved by the Supreme Court. Nor would such disparate areas as torts and income taxation escape the potential impact of the fundamental changes in our legal system the statute or amendment could cause.

In view of these wide ranging and highly undesirable side effects, guaranteed to overburden courts and legislatures for years to come, there is no justification for using either an HL statute or Constitutional amendment to reach their sponsors' goal: to ban or severely restrict the present constitutionally protected freedom of pregnant women to terminate their pregnancies. There is no sound reason to create chaos, confusion, and uncertainty in areas of law having nothing to do with abortion in order to ban or severely restrict the use of abortions.

In proposing these various "human life" amendments as a way of prohibiting abortion, the amendments' sponsors seek to take advantage of Justice Blackmun's observation in Roe v. Wade, 410 U.S. 113 (1973):

> The Appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. (If so), appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment.

In defining life as beginning at fertilization, the HL Amendment's sponsors hope to override the Supreme Court's conclusion in Roe that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn" 410 U.S. at 158. Thus, their assumption is that the HL Amendment would define a fetus as a "person." "Fetus", when used in this statement, refers to the unborn from the moment of conception, rather than in accordance with its medical definition which does not characterize the egg or embryo as a fetus until seven or eight weeks after conception.

Clearly, then, the HL Amendments' sponsors undertake to confer some constitutional rights on fetuses from the moment of conception--in particular, the right not to be willfully aborted. But in defining a fetus as a "person" under the Fourteenth Amendment, the extent of fetuses' rights is far from clear, and could only be determined by extensive testing in the courts. At least three judicial approaches could be adopted:

(1) Abortion alone is covered. A tour de force of judicial

construction could limit the constitutional rights conferred on fetuses to freedom from destruction by abortion and could deny the statute or amendment any other consequence. To reach this result, however, requires treating the references to "human life" or a "right to life" as merely code words designed to give the anti-abortion effort a more favorable public image without substantive effect. Worse, it requires a holding that not all "persons" are equal under the Fourteenth Amendment. A court might seek to justify this cynical course on the basis of indications that the sponsors focused on a definition of life merely to avoid a debate on abortion and thereby secure additional votes for the statute or amendment. But it seems unlikely that a court would follow this line of interpretation, as it requires ignoring the language which was in fact enacted into law.

(2) *Freedom from bodily injury is covered, but protection of property or other non-bodily interests is not*.

Under this view, fetuses would enjoy constitutional protection from physical injuries, but for other purposes would not be treated as "persons" in the fuller constitutional sense. Support for this interpretation could be derived from the references to "life" and the omission of references to "liberty" or "property" in the proposed statute or amendment, as an inference the HL Amendment's framers *intended* this result. However, to impute such an intent would involve the attribution of *contradictory* intentions to the amendment's sponsors, since the sponsors base the need for the Amendment on their belief that there is no meaningful difference between six-week old fertilized eggs and six-month old children, and the latter do enjoy property and other rights.

Nevertheless, this approach might be adopted as a pragmatic one. If constitutional protection is thus limited, fetuses will be seen as second class citizens prior to birth alive, with additional rights to be conferred only after birth has occurred. If this approach is adopted, the implications of the statute or amendment beyond abortion would be concentrated in the areas of tort law and criminal law, and might only accelerate current developments in those fields.

(3) Fetuses are "persons" within the meaning of the Fourteenth Amendment and elsewhere in the U.S. Constitution, entitled to full protection of all rights.

Under this more expansive view, fertilized eggs would have the full benefit of constitutional protection accorded other persons, limited only by the legislative ability to adopt reasonable classifications for equal protection purposes. Thus, every statute which confers rights only on birth alive or which measures age from birth rather than conception would be subject to judicial challenge. Furthermore, if they are viewed as persons, fetuses may even be seen as a "discrete and insular minority." See Ely, "Wages of Crying

Wolf: A Comment on Roe v. Wade", 82 Yale L.J. 920 (1973).

Indeed, the author of the HL statute, Stephen Galebach, contends that it is needed precisely because fetuses are the classic example of such a minority. Under this view, any classification which diminishes their rights logically would be subject to "strict scrutiny"--a nearly insurmountable barrier. The result could be to abolish most legal distinctions between fertilized eggs and live-born humans, even in areas having nothing to do with abortion.

Of the above approaches, only the last entails significant costs in altering social institutions to accommodate the HL Amendment--costs such as additional insurance expenses for obstetricians and gynecologists, loss of tax revenues, and unavailability of artificial insemination services. Admittedly, courts would be reluctant to adopt the third approach described above--precisely because they will not want to require these sweeping changes. It seems likely that for purposes of most (but not all) statutory and constitutional provisions, courts will find that fetuses are not to be viewed as full persons until birth, and are thus entitled only to protection from physical harms of all types, but not from other violations of individual rights such as property.

Nevertheless, even under a less expansive approach which avoids treating fetuses as full "persons," the HL Amendment would create three other kinds of important social costs that will almost surely be of large magnitude: (1) increased costs of maintaining overcrowded court dockets, (2) increased costs of legislative redrafting, and (3) increased costs to individuals and businesses from uncertainty in structuring transactions. These costs need to be carefully considered.

First, the HL Amendment will lead to a veritable explosion in new litigation because so much existing law is construed and applied in light of two assumptions:

(a) rights accrue only on birth alive;

(b) age is measured from birth, rather than from conception.

In a wide range of instances to be considered later in this statement, someone will have an incentive to test the constitutionality of those assumptions through litigation. The business of our federal judiciary already costs taxpayers nearly 1000% more than it did only twenty years ago, and there is a real choice society must make before we add to that expense in the course of attempting to limit abortion by the indirect means of recognizing fertilized eggs as "persons" in some sense.

Secondly, the HL Amendment will require considerable redrafting of legislation on a statute-by-statute basis, using vast numbers of staff hours to clarify when the legislature or Congress wants to distinguish fetuses from children, and when it either doesn't or can't. A single clarification won't do because the state is likely to want to treat fetuses differently, say, for tax purposes than for medical malpractice issues. Thus, in an age when the phenomenal expansion of legislative staff sizes has been well-documented, the HL Amendment would probably require further growth, with the attendant increased cost to the taxpayer.

Thirdly, the HL Amendment will create real costs to business and individuals as a result of the uncertainty that will surround its application. The result is fewer corporate transactions, delayed or unsatisfactorily altered estate planning, and more legal fees. For instance, what business would fail to protect itself against the possibility that its government contract might be voided later for failure to include fetuses in the population count relevant to the provision of its services to the government? Such "self-protection" is a cost of doing business, and one that would not exist without the uncertainty created by the methods of the HL Amendment.

What is most striking about these three kinds of costs involved with the HL Amendment is their complete lack of necessity. They result solely from the technique of defining fertilized eggs as "persons", and could be completely avoided by a straightforward prohibition or restriction on abortions. Compare S.J. Res. 62, H.J. Res. 27,62,92,99, and 133, which prohibit taking the life of the "unborn" directly. Regardless of how one feels about the issue of abortion, a more direct prohibition is surely more commendable than this attenuated "Human Life" technique, for it avoids the very real social costs and ancillary effects the "Human Life" method would engender, and a direct ban would require the rhetoric to reach the reality. Sound analysis is never enhanced by obscuring central issues.

The remainder of this statement will survey six broad areas of law to consider consequences of a HL Amendment in areas outside abortion:

(1) legislative apportionment and governmental administration

(2) constitutional protection of privacy and autonomy

(3) criminal law

(4) tort law

(5) income tax

(6) property and estates.

It does not purport to deal with the merits of the abortion issue itself, but rather is an examination of the costs (and benefits) that result from the indirect technique the HL Amendment would use to ban or restrict abortion. Nor does this statement purport to deal with the serious constitutional questions raised by the purported exercise of Congressional power under the 14th Amendment in S.158/H.R.900 but rather will assume that the proposed statute can be given effect to the same extent as a similar Constitutional amendment. For simplicity's sake, the term "HL Amendment" will be used to describe them both. I am convinced that the serious side effects of an HL Amendment--most notably the reallocation of scarce judicial and legislative resources--make it a wholly indefensible approach to the abortion issue.

I. LEGISLATIVE APPORTIONMENT AND GOVERNMENTAL ADMINISTRATION

One likely effect of such an amendment is a mandatory reapportionment of the United States House of Representatives, and of the various state legislatures. This is so because regardless of which of the three approaches to judicial review is adopted, a "person" defined under Section 1 of the Fourteenth Amendment--which protects "life, liberty, and property"--presumably would be the same as a "person" under section 2 of that same Amendment. If so, the apportionment of representatives governed by section 2 would have to be based upon a count of "the whole number of persons in each state"--including fetuses, and the decennial census mandated by Article I, section 2 would have to be updated to include the unborn.

Section 2 of the Fourteenth Amendment requires:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state. (emphasis supplied)

To the extent that pregnancies are not geographically distributed at random, nor are spontaneous abortions or miscarriages, the HL Amendment probably would require some reapportionment of Representatives to those areas where more fetuses "reside"--probably urban and low-income regions. In theory, this is not especially troublesome, at least not if one regards a fetus as a "person". Its administration is quite a different matter, (to be considered later).

Other illustrations in this section are taken from New York law, to illustrate the potential impact of the amendment in a large metropolitan state. However, in many respects the New York statutes are by no means unique. Comparable problems could arise in many other states as well.

Under Reynolds v. Sims, 377 U.S. 533 (1964), the states are also required to apportion their legislatures by population distributions--"one man, one vote"--and to do so at least every ten years. The New York State Constitution, Article 3, section 4, provides for re-apportionment based on the federal census, and in special circumstances it requires instead a special state enumeration. It is unclear whether Reynolds might mean "one person, one vote", and equally unclear whether New York's provision for special tabulations would mean the inclusion of fetuses. It is no answer to say that fetuses won't vote, for neither will children under 18, yet they are counted. The only certainty is more litigation.

One particularly troublesome question involves the size of New York Senate. Article 3, Section 4, sets the size at 50 members and seeks to make that size consistent with the one-man, one-vote principle by reallocating senators among districts, rather than revising district boundaries, which correspond to county boundary lines. In order to achieve this objective, the section provides for additional senators, if required because of population growth of a given county already entitled to three or more on the basis of the last apportionment, even though the result is to increase the size of the Senate above 50.

It is quite possible that the Human Life Amendment would require expansion of the New York Senate if fetuses are to be counted, since it is probable that the more heavily populated counties in New York contain a greater number of fetuses.

Whether other population counts used for government distributions of benefits and government delegations of power would have to be modified is unclear, and depends upon how expansive a view of "person" is to be applied to fetuses. A narrow judicial approach to the HL Amendment would result in more uncertainty in this area, while an expansive one would wreak considerable mischief.

Consider first the problems respecting delegated local powers. In delegating powers to local municipalities, New York differentiates among various sizes of cities. Application of a number of sections in the General City Law of New York to a city depends on the population of the city. It is unclear whether all "persons", including fetuses, must be counted for the purposes of these statutes, but litigation is likely; at a minimum, litigation concerning local government law is certain to be unnecessarily complicated and confused.

It may be worthwhile to ponder just a few of these difficulties. New York General City Law § 20-e grants the power of eminent domain to cities with over 75,000 inhabitants, as counted in the federal census. While it is unclear whether New York itself would be obligated to count fetuses for this purpose, the federal census almost surely would be, so that this statute, at the very least, would have to be redrafted. And it is easy to imagine an unwilling property owner contesting the taking of his land by a small city arguing that fetuses should not have been counted for eminent domain power delegation purposes, as was done in § 20-e.

Some other instances of population-based delegations demonstrate the question is not trivial: New York General City Law § 36, concerning numicipal street improvements and buildings not on mapped streets for cities under one million residents; General City Law § 21-a authorizing licensing for overnight street parking in cities over one million people; Public Health Law § 356 making county legislative bodies into Boards of Health in counties under 150,000 persons; and Education Law §3251 requiring Boards of Education in cities under 125,000 to keep daily census counts of everyone under 18 years old. Do these include fetuses? In at least some instances, as with the Education Law § 3251, it seems likely the HL Amendment would require that the government count fetuses, for how can it be "reasonable" under the Equal Protection Clause of the Fourteenth Amendment to count one day old infants and not nine month old fetuses for school planning purposes? But no one really knows the answer, and vast amounts of fruitless litigation seem inevitable.

Consider also the potential problems respecting the distribution of benefits to localities. Under general revenue sharing and various other grants made by the federal government, local disbursements of funds are to be made on a per capita basis. If fetuses are "persons", it would appear that the Equal Protection Clause will require that they be included in this enumeration for at least some purposes, such as Medicaid, as once government chooses to distribute a benefit, it may not exclude certain "persons" without justification, (probably "compelling justification" in the case of fetuses).

New York State Finance Law § 54 uses a census count for equalization and assessment purposes, as well as to determine state aid to local governments. The same equal protection difficulty arises in this context. But even if it were not present, the statute mandates the use of the most recent U.S. Census or a "special population census", whichever is later. If the U.S. Census is used, fertilized eggs may be included in the data, though they arguably should be removed. But can anyone imagine localities NOT suing the state if they believe they can obtain greater revenues on account of the HL Amendment? Suing the government has become a national pasttime of sorts--rightly or wrongly--and the Human Life Amendment is likely to exascerbate that trend, presumably contrary to its sponsors' design.

Even if the conceptual and legal effects are overcome, administration of the HL Amendment's implications for population surveys present a nearly insurmountable barrier. Related problems arise in determining age for eligibility for Constitutional elected officers, under Art. I, § 3 and Art. II, § 1.

Two chief difficulties arise: the problem of recognition of conception, and the problem of timing in the counting. First, in attempting to get an accurate record of all "persons" defined at the moment of egg fertilization, the census taker is forced to do what medical science cannot--identify every pregnancy from the moment of fertilization; otherwise, he will miss some embryos and some fetuses. As an administrative matter, then, not every fetus can be counted at one moment in time.

Secondly, counting over a time interval won't overcome the first problem. At the cut-off point the census-taker runs into the recognition problem again. Worse, use of a standard one-year interval will miss some fetuses, depriving them of "vested" rights under the HL Amendment, because roughly 20% of all pregnancies terminate from natural causes, and a nine-month calendar year hardly seems practical for other governmental purposes.

A timing alteration so that the census-taker waits to count "after-the-fact" living and deceased fertilized eggs likewise offers no escape from the recognition problem. This solution will fail to count the fetuses when they are fetuses: depriving them of their rights as "persons" at the time, instead granting them benefits they would possess anyway as living infants, not fetuses--unless the census is used to grant retroactive "benefits" to "miscarried" fetuses, a most ludicrous proposition.

Furthermore, such a post facto determination still wouldn't be able to determine when conception occurred, so that allocating a fetus to any given year would be impossible for births and spontaneous abortions occurring before October of each year. Yet to count fertilized eggs at the time they actually are just that is a futile task--they simply can't be recognized.

Consequently, the confusion surrounding the administration of the counting of fetuses, which at the least would be required for purposes of § 2 of the Fourteenth Amendment, can only lead to arbitrary techniques and yet more litigation. That this is a waste of time, effort, and taxpayer's money is far less offensive, though, than the fact that a just determination is an impossibility given current medical knowledge.

Adminstratively, then, the two most likely resolutions are a post-facto set of arbitrary count-back lines, comparable to the 300 day presumption used by some states in paternity suits, e.g., California Civil Code § 7004, or a statute requiring the reporting of positive pregnancy tests analogous to those requiring doctors to report births and deaths. Concerning the latter, the only way to identify a fertilized egg is through its mother's identity, so a record of conceptions will be a record of pregnant women. Needless to say, that is a considerable invasion of privacy.

II. CONSTITUTIONAL PROTECTION OF PRIVACY AND AUTONOMY

It is unclear just what effect the HL Amendment would have on a woman's privacy and autonomy rights other than abortion. In the worst-case scenario, a full bureaucratic apparatus would be established to guard a fetus' interests where the interests diverge from the woman's, and the state would regulate many aspects of the woman's behavior during pregnancy--such as smoking, drinking, traveling, and use of medication--to protect the health of the fetus. Indeed, a class action on behalf of fetuses to enjoin such behavior by pregnant women would be reasonably foreseeable. At a minimum, a pregnant woman be prohibited from "abusing or neglecting" the fertilized egg within her if the statutes applicable to live children were applied to fetuses as well.

III. CRIMINAL LAW

If fetuses are declared "persons" in some sense under the Fourteenth Amendment, vested with a "right to life," state and federal penal codes may require some changes.

One surprising effect might be to make capital punishment unconstitutional. The Helms-Davis version of the HL Amendment (S.J.Res.19 and H.R.392) states:

> "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency." (emphasis added)

The word"paramount" was undoubtedly included to emphasize that the right to life should be deemed superior to the right of privacy explained in Roe v. Wade rather than merely balanced against it. But "paramount" is in no way qualified, so that the "right to life" should be deemed superior at all other rights, including the state's right to inflict the death penalty. On its face, the HL Amendment provides a powerful basis for contending that it creates a substantive right to life that cannot be taken away under any circumstances.

Other proposed anti-abortion amendments, (e.g.--H.J.Res. 13,32,50), avoid this difficulty by merely extending the "right to life guaranteed in the Constitution" to fetuses, so the abolition of capital punishment is not a necessary effect of an HL Amendment. But such a limited right to life might actually fail to ban abortion, if requiring women (and not men) to use their bodies for the physical support of fetuses would be a denial of equal protection to women. See, e.g., Regan, Rewriting Roe v. Wade, 77 Mich.L.Rev. 1569 (1979).

Thus, to be effective, an HL Amendment using the redefinition of "person" technique might actually have to prohibit capital punishment in order to be effective in banning abortions. That may or may not be a good thing, but it must be considered as part of the HL Amendment. And it is worth recalling that convincted murderers are certain to crowd our court dockets with still more habeas corpus petitions on this ground even if uncertainty surrounds the extent of "the paramount right to life."

Other aspects of penal codes might also be affected. For instance, Model Penal Code §210.0(1) defines "human being" as "a person who has been born and is alive," and § 210.1(1) states that criminal homicide occurs only when one causes the death of another "human being." The Code, like most penal statutes, reflects the view that general homicide statutes do not punish one who destroys a fertilized egg. But if a fertilized egg is protected as a "person," the legislative classification in § 210.0(1) may be too arbitrary to pass Constitutional muster, unless of course, a new section is added elsewhere making abortion subject to the same penalty as an equivalent murder.

Another example of uncertainty that will require judicial resolution or legislative redrafting is seen in Model Penal Code § 211.2: "A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." Would a mother who "recklessly" jeopardizes her fetus--say, by riding a roller coaster--be subject to criminal prosecution?

While it is difficult to predict the criminal law implications of the HL Amendment with much certainty, it is clear that these possible consequences could be avoided by a more finely-tailored prohibition on abortion.

IV. TORT LAW

In the area of tort, the redefinition of fertilized eggs as "persons" effected by an HL Amendment has significant implications for medical practice and malpractice, and for tort actions brought by the unborn.

The HL Amendment may have a "chilling effect" on the practice of medicine for several reasons. First, a doctor's duty to report injuries or abuses of children to state agencies might be extended to fetuses under reporting statutes such as 119 Mass. Gen. Laws Ann. § 39A (1980). This would force a doctor into the harrowing position of reporting pregnant women who procure illegal or foreign abortions--a considerable breach of trust--or risking liability for failure to report the conduct.

Secondly, given the legal rights of the fetus, doctors would have to be cautious in their treatment of pregnant women. In particular, they might be reluctant to accept the women's consent to a medical procedure dangerous to the fetus, and they might require pregnancy tests before performing dilation and curettage.

Thirdly, doctors would almost surely cease to dispense certain forms of birth control for fear of becoming accomplices to illegal killings of fertilized eggs. If a human being is vested with the "right to life" at the moment of fertilization, intrauterine devices and "morning after" pills would cease to be legal forms of birth control. See Goodman and Price, Abortion and the Constitution: An Examination of the Proposed Anti-Abortion Amendments, 7 Rut.-Cam.L.J. 671, 679 (1976). These contraceptives act by preventing the fertilized egg from implanting in the uterine wall, and thus destroy the fertilized "person". Since the HL Amendments take effect "from the moment of fertilization", (S.J. Res.19, H.R.392,H.J. Res.27, 39, 62, 92, 99, and 133), any birth control method that acts after fertilization has occurred would be illegal.

Finally, none of the proposed HL Amendments distinguish between fertilization that takes place in the woman's body, and in-vitro fertilization. Since many in-vitro fertilizations fail, often after fertilization takes place, few physicians will want to risk liability for the death of the "person." The only procedure by which many women can bear children--in-vitro fertilization--is likely to become less available after an HL Amendment takes effect.

In Roe v. Wade the Supreme Court indicated much concern for a doctor's ability to exercise his professional judgment concerning pregnant women. Whether that aspect of Roe would be a casualty of the HL Amendment cannot be known until it is litigated.

With respect to tort actions brought by a fetus, the HL Amendment would probably push some states far beyond their current level of remedies for the unborn while merely taking others down the road they seem to be heading anyway. Some states have permitted a mother to bring a wrongful death suit for injuries to her fetus, se e.g.--Simmons v. Howard University, 323 F.Supp. 521 (D.D.C. 1971), Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949), though many, such as Ohio and Maryland, require that the fetus have been viable at the time of miscarriage or stillbirth. Some states, including New York, still hold that fetuses are not "persons" within their wrongful death statutes. See Kruger, Wrongful Death and the Unborn: An Examination of Recovery after Roe v. Wade, 13 J. Fam.L. 99, 111 (1973-74). In Roe, the Supreme Court explained that states which permit the suits do so "to vindicate the parents' interest" and do not confer legal recognition of fetuses as "persons in the whole sense" even in those states. 410 U.S. at 162.

However, the law of torts in a few states has been moving in that direction; this is a development unique to tort law due to the great pressure to create a damage remedy for intentional and negligent injuries to and deprivations of an unborn. Even this development, however, has been quite limited.

In Dietrich v. Northhampton, 138 Mass. 14 (1884), Justice Holmes held that a child in the womb has no existence separate from its mother and thus cannot sue by an administrator for injuries leading to its premature birth and death. But today, courts generally recognize a cause of action for prenatal injuries brought by a child who was born alive. See, e.g.--Endresz v. Friedberg,24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

On top of bringing all states in line with Simmons and Endresz, an HL Amendment is likely to provide support for two additional kinds of tort action. First, it will probably require that the "born alive" condition of Endresz be eliminated, enabling the estate of a miscarried or stillborn fetus to bring a suit against third persons for negligent acts leading to its death. In most cases this will mean the parents, as administrators, bringing a new kind of malpractice claim against the obstetrician.

Secondly, it may permit the estate of the fetus to bring a suit against one of its parents. In Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E.638, 640 (1900), the court stated: "If the action can be maintained it necessarily follows that an infant may maintain an action against its mother for injuries occasioned by the negligence of the mother while pregnant with it." Except in those states where the parental immunity rule retains vitality, suits by the fetus against a parent are a likely consequence of the HL Amendment. This is more likely to be important where the estate of the fetus is used as a way of suing one spouse for the wrongful death of the other than where the fetus sues its mother for its own wrongful death, but both are possibilities.

It is certainly arguable that some of these implications of the HL Amendment for tort law are desirable, though most seem not to be. However, one must question whether even the beneficial implications should be imposed on the states by the federal Constitution. Further, it is doubtful that the HL Amendment is the best way to effect these developments. Conflicting results in state courts would remain to be resolved by a Supreme Court which normally decides only 120 cases each year. Those conflicts which the Supreme Court fails to resolve can only lead to vast confusion and further litigation over how much protection the HL Amendment actually grants "persons" for state tort law purposes.

V. INCOME TAX LAW

The Internal Revenue Code is a somewhat unique domain in that deductions allowed in computing taxable income are often viewed by the courts as a matter of legislative grace, seldom hindered by constitutional limitations. But the HL Amendment might affect some provisions in a way that would startle its sponsors.

Section 151(e)(1)(B) currently provides a $1,000 exemption for each dependent "who is a child of the taxpayer". "Child" is defined as "an individual who is a son, stepson, daughter or stepdaughter of the taxpayer." If a fetus is defined as a "person", this language may be interpreted to cover the unborn; it is even conceivable that the Equal Protection Clause might require it to be so read. In either event, Code § 152 (a)(1) defines "dependent" in a way that could cover fetuses, since they are entirely supported by their parents. Thus § 151 might permit a woman to exclude $1,000 of her income for the year before a child is born, as well as after birth. This would be as true for fertilized eggs which spontaneously abort as it is for infants who die tragically young, of course. Treasury Regulations § 1.152-1(b) provides: "The fact that the dependent dies during the year shall not deprive the taxpayer of the deduction if the dependent lived in the household for the entire part of the year preceding his death."

To many people this additional deduction for a year (or two years, if fetal life continues into the following taxable year) will be seen as desirable, or at worst neutral. Its cost to the Treasury may be inconsequential. However, it might actually serve to finance abortions procured in other countries.

The tax benefit of a $1000 deduction for a married couple with taxable income of $40,000 is $430. For these taxpayers, that tax saving may represent an amount sufficient to finance travel costs to procure a legal abortion in a foreign country. In addition, the Internal Revenue Service has ruled that the cost of an abortion "not illegal under state law" is deductible as a medical expense within the limitation of section 213 of the Internal Revenue Code. See Revenue Ruling 73-201, 1973-1 Int. Rev. Cum. Bull. 140.

What would be the result if a single woman living in Detroit, earning only $10,000 per year, upon detecting an unwanted pregnancy, obtained an abortion in Toronto? Many abortions are legal under Canadian law, and the bus fare from Detroit to Toronto is only $47 round trip. If she became entitled to a $1000 "fetal exclusion" under § 151 as a result of the pregnancy, the resulting reduction in her income taxes, $210, would more than cover the cost of the bus trip. If her pregnancy occurred in December and was not terminated until January or later, a second $1000 "fetal exclusion" might be allowed for the following year as well.

In addition, if allowance of a deduction for the abortion is determined under the law of the place where it is performed, even though not the taxpayer's state of residence (an issue not addressed in Revenue Ruling 73-201), she may also deduct the cost of the abortion. Thus the HL Amendment might merely prohibit abortions for low-income taxpayers who cannot afford a foreign abortion, while providing a financing mechanism for middle-income or wealthytaxpayers for whom a "fetal exclusion" and medical deduction would produce a larger tax saving.

Thus, the HL Amendment, in eliminating the inequity of treating fetuses differently from infants in the Internal Revenue Code, has the potential to create another inequity: taxpayer-financed abortions only for those in tax-brackets high enough to realize significant savings from the recognition of fertilized eggs as "persons" in the full sense. More alarming to some, prevention of such tax maneuvers to realize these tax benefits would require close interogation by IRS auditors of even innocent women who miscarry, a brutal procedure at the very time they most need sympathy and understanding. The choice well may be between a gross intrusion on privacy or administrative tolerance of at least some tax-financed foreign abortions.

Finally, it is worth recalling that even an adjudication holding that the HL Amendment has no effect at all as relates to the Internal Revenue Code requires a substantial allocation of judicial time and resources to answer the very question of the validity of the practices just described; for can anyone seriously assert that no one will attempt such a tax scheme?

One taxpayer has already contended that insurance proceeds received upon the death of a five day old racing horse are taxable as a long-term capital gain, on the ground that the holding period began at conception rather than birth. See Greer v. United States, 408 F.2d 631 (6th Cir. 1969). The Court of Appeals rejected the contention on the ground that to measure the holding period of the foal from its conception would not be to read the tax statute in its "ordinary and natural sense." How many more similar tax cases might courts be asked to decide if fetuses are treated as persons from the moment of conception?

E. Property Law:

In the field of property rights, the critical implications of the HL Amendment center around future interests and intestate inheritances.

Just as modern tort law continues to refuse a cause of action on behalf of fetuses which are not born alive, I am unaware of a single instance in which a share of the estate of a decedent has been held to have vested in a fetus that was never born alive as a human being. This common understanding that birth alive is necessary in order for an interest in property to vest in an individual is illustrated by § 2-1.3(a) of the New York Estates, Powers & Trust Law as follows:

> "Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue...children, descendants, heirs...of the creator or another, includes:...
>
> "(2) Children conceived before, but born alive after such disposition becomes effective." (emphasis supplied)

Likewise, I am aware of no instance in which the attainment of a designated age by a human being was held to refer to the time elapsed since conception rather than since birth. The HL Amendment might be held to reverse either or both of these underlying assumptions as to the time when rights vest or when individuals attain designated ages, depending on how expansively "person" is read under the 14th Amendment. It is quite possible that the second possible approach described in the introduction would be followed, protecting bodily interests but not property rights for fetuses. But until the legal questions are thoroughly litigated in the wide range of contexts in which they may arise, the effect of the HL Amendment is likely to be chaos and confusion in an area of the law where certainty is so vital that much of the current law dates back to medieval England.

To illustrate the scope of this problem, I have listed below some sections of the New York Estate, Powers and Trust Law whose accepted meaning would be thrown into doubt upon adoption of any "Human Life" statute or amendment, since individuals described as "surviving" might than include fertilized eggs. Since the questions are based on the potential broad application of the new definition of "person", this will be but a detailed illustration, in an area with which I am particularly familiar, of what every state would have to cope with in many of the other areas discussed earlier in this statement.

§ 3-3.3(a) "Unless the will provides otherwise:

> (1) Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes."

If the testator's brother predeceases the testator, leaving a wife who is pregnant, but who later miscarries, did the brother leave "issue surviving"? If he did, the estate of the fetus would take a share which would pass to his mother by intestacy.

§ 4-1.1 A bequest to "children" under this general intestacy statute might include a fetus. If so, its share passes to its parents, since it leaves neither a spouse or issue. If the bequest were to "children", one of whom was living and the other a fertilized egg never born alive, it would be distributed one-half to the child and one-half to the parents as heirs of the egg. Only if both parents were dead would the bequest pass entirely to the surviving child.

§ 5-1.1 The share of a surviving spouse who elects against a decedent's will depends on whether or not he is survived by issue. Is a fertilized egg, later stillborn, such issue?

§ 5-3.1 The provision for an exemption for the benefit of a decedent's family, if the surviving spouse is disqualified, vests in "the decedent's children under the age of twenty-one years."

Is a stillborn egg included?

Is a child who is under twenty-one, but who was conceived more than twenty-one years before the death of the decedent, included?

§ 5-3.2 The provision for a share for a child born after the execution of the parent's will likewise raises the question whether a stillborn egg, conceived after the execution of the will, is entitled to take.

§ 5-3.3 The limitation on testamentary dispositions for charitable purposes may be invoked by "surviving issue." Does this include a fetus which is later miscarried?

§ 6-5.6 The statute refers to "persons living at the death of the person named as ancestor." Does this include a fetus which later miscarries?

§ 6-5.7(b) "A future estate conditioned upon the death of a person without children...is defeated by the birth of a child conceived before but born alive after the death of such person."

Does the requirement of birth alive discriminate unconstitutionally against fertilized eggs which are not born alive?

§ 7-4.1 Is a fetus a "minor" prior to birth for purposes of the statute authorizing gifts to minors?

§ 7-5.1 Is a fetus a "person" for whom a bank trust account may be established?

As an historical matter, New York already has had experience with the impact of constitutional uncertainties on probate practice. In Matter of del Drago, 287 NY 61, 38 NE2d 131 (1941) the Court of Appeals held the predecessor to § 2-1.8 of the Estates, Powers & Trust Law, dealing with the manner in which persons interested in a estate share the burden of federal estate taxes, was unconstitutional under the U.S. Constitution. Almost a year followed before the decision was reversed by the Supreme Court in Riggs v. del Drago, 317 U.S.75, 63 S.Ct. 109 (1942). During that year, the administration of many New York estates came to a total halt because of uncertainty as to the size of the shares of various legatees created by the state court decision.

The uncertainties posed by the HL Amendment may be greater or lesser than those which arose in New York as a result of del Drago in 1941; no one can really say. But there are a larger number of statutes involved, and 49 other states as well as New York. To be sure, crowds do not march on Washington to protest problems about contingent remainders. But that is at least partly because the institution of property has worked so well in settling expectations over the last 200 years. Deprive legatees of their inherited shares for some length of time, or force them to share inherited wealth with a fetus' heirs, and one will see considerably more interest: "rights in property are basic civil liberties," Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

III. CONCLUSION:

If ratified, a Human Life Amendment may have substantial ramifications in areas other than the prohibition of abortion. This statement has surveyed several such consequences, but cannot claim to be all-encompassing, for no amount of speculation can foresee all the subtleties that clever counsel will discover when the time actually comes. And regardless of how far courts go in treating fertilized eggs like human beings, society will be forced to bear the costs of crowded courtrooms, legislative redrafting, and transactional uncertainty. If what is desired is a ban on abortions, it should be enacted as such, for it is irrational to do so by indirect means which create chaos and confusion in other areas of the law.

PART 5.--STATEMENTS OF STATE OFFICIALS SUBMITTED BY SENATOR BAUCUS

STATE OF NEW YORK
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ROBERT ABRAMS
ATTORNEY GENERAL

June 11, 1981

Honorable Max Baucus
Subcommittee on Separation
 of Powers
United States Senate
Washington, DC 20510

Dear Senator Baucus:

As the chief legal officer of the State of New York, I am writing to express my concern about S. 158, the so-called "Human Life bill".

Whether or not one agrees with the Supreme Court's 1973 decision in Roe v. Wade interpreting the term "person" as used in the Fourteenth Amendment to the United States Constitution, that interpretation cannot properly be overruled by a simple majority vote of Congress. The process for amending the Constitution is a difficult one, but it has repeatedly proved to be no more difficult than our democracy demands. The mandated amendment process is one we simply cannot afford to circumvent.

Likewise, the Supreme Court's decision cannot properly be overruled by removing from the jurisdiction of the federal courts cases which affect women seeking abortion. To single out one class of women in this way violates the constitutional guarantee of equal protection. To the extent we short-circuit the constitutional amendment process by manipulating federal court jurisdiction, we are tampering with an institution at the heart of our constitutional system of checks and balances.

In sum, S. 158 is in my view both unconstitutional and unwise.

Sincerely,

Robert Abrams

ROBERT ABRAMS

STATE OF COLORADO

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203
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1876

Richard D. Lamm,
Governor

Statement Opposing S.B. 158

By

Richard D. Lamm, Governor

State of Colorado

July 1, 1981

INTRODUCTION

The purpose of this statement is to register my firm belief that Senate Bill 158 and its House companion bill, H.R. 900, are unconstitutional exercises of Congressional power. I have serious concerns about the possible enactment of these bills because of the grave implications for pregnant women who might choose to have abortions.

The ostensible purpose of S.B. 158, the "Human Life Statute," is to answer the question of when life begins. It is a Congressional attempt to decide a moral, legal, and scientific issue that no one to date has conclusively answered, and on which there is wide disagreement. By defining a fetus as a human being and thereby attributing to it the rights guaranteed under the 14th amendment, this bill would restrict rights guaranteed under the Constitution by depriving the American woman of the "fundamental right to privacy... (which) encompasses her right to decide whether to terminate her pregnancy."

SECTION 1

Scholars of American constitutional law view Section 1 as an attempt to end run the 1973 decision of the Supreme Court in Roe v. Wade. This section attempts to establish a "theory of life" which would effectively prohibit abortions -- exactly what the Supreme Court in Roe said a state could not do. The Supreme Court addressed the question of when life begins by stating that "a fetus is not a human being within the meaning of the 14th amendment." The court set forth a three-step approach that protected the interests of society in limiting abortions in the last trimester of pregnancy, but left decisions about abortion in the early months of pregnancy to the woman and her doctor. The net effect of S.B. 158 would be to remove a decision on abortion from the privacy of the intimate counsel a woman may hold with her physician.

SECTION 2

Section 2 of S.B. 158 makes it difficult for pregnant women to exercise their constitutional rights as recognized in Roe v. Wade by prohibiting federal courts from interfering with state laws which violate the rights secured in Roe. Section 2 also violates the separation-of-powers principle because Congress is attempting to use its jurisdiction-controlling authority to substitute its views of constitutional protection for those already established by the federal judiciary.

EFFECT ON STATE LAWS

While most attention has been given to whether this bill would enable states to restrict or prohibit abortions, a severe erosion of state autonomy would result in states, such as Colorado, which have adopted statutes permitting abortions to take place. During the 1981 legislative session, the Colorado General Assembly refused to amend state law along the lines of S.B. 158. State legislators, Republican and Democrat alike, argued persuasively that Colorado laws on abortion have worked well over the past decade and should not be changed. Yet, passage of S.B. 158 would raise serious questions about the continued validity of Colorado's abortion laws.

OTHER RAMIFICATIONS

Prior to the legalization of abortion, nearly half of all maternal deaths were due to induced abortion in some areas of the country. Since then, legalized abortions have become a safe medical practice and the present risk of death due to early abortion is less than one per one million procedures. The risk of death from abortion today is even less than the risk for mothers carrying babies to term, which is 14 per one million procedures. The improved safety is due almost entirely to the legalization of abortion which has fostered the introduction of improved techniques and skills.

The effect of S.B. 158 would be to encourage the criminalization of abortion by permitting either the states or the federal government to declare abortion to be murder. We would most likely return to pre-legalized abortion conditions. Abortions once again would be performed in "back alleys" and low income people would bear the brunt of the statute more heavily than others. Moreover, the use of birth control devices which interfere with the implantation of a fertilized egg (declared to be a person) may be found illegal. In the same way, medical procedures which can cause spontaneous abortion, such as amniocentesis, certain medications, and radiation, may be found to be illegal. Nothing in S.B. 158 prevents any of these possibilities from being raised in the courts.

The result of women carrying "high-risk" pregnancies to term would be an increase of maternal and infant complications and mortality. Much of the financial burden of this would fall on the taxpayer at a time when government programs are being severely cut.

Teenagers may be more affected by this legislation than any other category of "high-risk" pregnancies. Young women would be forced to continue unplanned pregnancies for which they are totally unprepared. While one-third of all abortions are now performed on teenagers, more than 90 percent of teenaged mothers who do give birth choose not to give up their babies for adoption. Yet, those who choose to bear their children often find themselves unprepared for the responsibilities of parenthood. Thousands more teenage mothers would be forced to give birth to children for whom they are not prepared.

And finally women who are pregnant because of incest or rape will not be able to abort fetuses clearly created against their will. What kind of a society have we created which would say that a woman must bear the full consequences of a rapist or an immoral father or brother?

Other health and social ramifications of S.B. 158 are listed in a very fine article written by Dr. Warren M. Hern for the Denver Post. I have appended that article to this testimony.

CONCLUSIONS

S.B. 158 is clearly an attempt to overrule the Supreme Court's interpretation of the Constitution. If passed and upheld by the Court, S.B. 158 would give the States the power to prohibit the performance of abortions and also probably would prevent States from allowing abortions to take place. Whether or not to bring a new life into the world is a private decision to be made between a woman and her doctor. I consider it strange, indeed, that proponents of less government would urge so massive an intrusion of government into private affairs.

Prohibiting abortions by statute would not stop women from obtaining abortions. On the contrary, abortions would return to the back alley, where risks to women would increase manifold. I cannot support this bill which seeks to remove the protection given women by the Constitution. Clearly, the outcome would not be to protect human life. To the contrary, we are now protecting human life by providing safe, legal abortions for women and we are not interfering in the constitutional right of women to make such a choice on their own. I support the decision of the United States Supreme Court setting forth constitutional guidelines which protect the rights of women and of society alike.

[From the Denver Post]

The Human Life Statute: Will It Protect Life or Power?

By Dr. Warren M. Hern

The Colorado Legislature recently rejected two bills which would have made the human embryo a person from the moment of conception. If the bills had passed, any Colorado woman who had an abortion or miscarriage would be subject to prosecution for homicide.

The "Human Life Statute" now before the U.S. Congress would have the same effect. It requires only a majority in both houses, plus the president's signature, to become law.

Senate Bill 158 (HR 900 in the House), which is in the Senate subcommittee on separation of powers and is expected to pass the full Senate and be signed into law by President Reagan, seeks to impose a view of human existence on our society which is appealing in its apparent simplicity: Human life begins at conception. On examination, however, this question proves to be more complex. Does conception mean "fertilization" or "implantation?" Which conception? Could it have been the one (which one?) that occurred three million years ago near Olduvai Gorge in Africa?

The view of a theoretical instant in which each individual comes into being is in conflict with the view of life as a continuous stream reaching back into the origins of life itself hundreds of million of years ago. It is in conflict with the fact that each sperm and ovum is a human cell, that each diploid cell in the rest of the body has 46 chromosomes, and that, while the cells in each of our bodies are constantly dying and being replaced, our structures remain.

The idea that each fertilized ovum is a person is about the same thing as saying that each set of house plans is a house. Calling an ovum a person does not make it so. Calling a fetus an unborn person (and perhaps baptizing it) is as illogical as burying an undead body. This ruse perpetuates an illusion that is useful to some, but in the case of SB 158, the consequences to others may be catastrophic.

Since the bill in question is aimed at making abortion illegal, it is worthwhile to examine, some of the health and social consequences that such an action would have.

In 1920, the maternal mortality rate in the United States was 680 per 100,000 live births. By 1960, maternal mortality had fallen to around 38 per 100,000 live births. This reduction was brought about by a number of things: better prenatal care, better obstetrical care, the introduction of blood transfusion, antibiotics and other drugs; longer birth intervals, postponed first births, fewer total pregnancies per woman and better nutrition.

Nearly half of all maternal deaths in both 1920 and 1960, however, were due to induced abortion in some areas of the country. In New York City, as late as 1965, 55 percent and 65 percent of maternal mortality among black and Puerto Rican women, respectively, was because of septic abortion.

Since 1970, however, abortion has become the safest surgical procedure—and the most heavily monitored—in the United States. The number of abortion deaths dropped from an average of 250 in the mid-1960s to less than 10 per year currently, while more than twice as many abortions are now being performed. A barrier contraceptive method backed up by early abortion is now the safest fertility control method available to women, and early abortion is now the safest of all possible outcomes for pregnant teenagers.

This improved safety is almost entirely because of the legalization of abortion, first in Colorado and in other states, then nationally, which permitted the introduction of improved techniques and the accumulation of skills and experience by physicians performing abortions. The risk of death from early abortion is now less than one per million procedures.

Overall, the risk of death due to abortion is currently less than two per 100,000 procedures, whereas the risk of death due to term birth is approximately 14 per 100,000 live births under the best circumstances. The risk of major complications in abortion is 1/200th the risk a woman experiences in term birth. Caesarean section is one major complication, and if this is necessary, her risks are magnified many times.

It is important to understand that these risks are experienced by women who are pregnant whether they wish to be pregnant or not, and whether they are rich or poor.

From a medical point of view, abortion should be the indicated treatment for pregnancy unless a woman has a desire to carry the pregnancy to term and reproduce.

The effort to criminalize abortion through the mechanism of according the fetus the status of personhood, however, would have serious public health consequences not envisioned by its proponents. If interpreted literally by a zealous prosecutor, SB 158 would have the following consequences:

- It would proscribe all abortions, even if the woman's life is in immediate danger.
- It would criminalize the use of intrauterine devices.
- It would prevent the use of certain oral contraceptives and drugs such as diethylstilbesterol used in preventing pregnancy following unprotected intercourse, as in rape.
- It would prevent treatment, emergency or otherwise, of hydatidiform mole, chorioadenoma destruens, choriocarcinoma and unruptured ectopic pregnancy. The first three, including the third, which is a cancer, arise from conception to become an undifferentiated mass of cells or water sacs. These products of conception would be classified as "persons" under the law.
- It would prevent the treatment of women for conditions unrelated to pregnancy without absolute proof of non-pregnancy, which is impossible under most circumstances.
- It would result in the prosecution of women experiencing spontaneous abortion (miscarriage) for negligent homicide if evidence could be found that the woman engaged in any physical activity or substance use that might lead to spontaneous abortion.
- It would prohibit the use of anniocentesis for the diagnosis of genetic defects.
- It would probably interrupt current research on in-vitro fertilization (test-tube babies) for the benefit of infertile couples.
- It would prohibit evaluation of infertility in women since non-pregnancy would have to be proved before tests could be performed.
- It would prevent the use of X-rays on women who had suffered trauma and who were currently pregnant or might be.
- It would disrupt a confidential doctor-patient relationship in all cases of women in the reproductive age range.
- It would increase the number of unplanned pregnancies due to the criminalization of effective contraceptives.
- It would result in a catastrophic increase in the number of deaths and life-threatening complications due to improperly performed abortions.

As the result of criminalization, the number of abortions performed would probably drop to no less than half of the 1.5 million currently being performed nationally. An unknown number would be added to this fraction as the result of an increase in the number of unplanned pregnancies because of the criminalization of contraceptive methods.

Women who experience "high risk" pregnancies—teenagers, older women, women who have recently delivered or who have had many pregnancies—would be forced to carry pregnancies to term whereas they are likely to choose abortion under the current circumstances for their own reasons. The result will be an increase in maternal mortality and complications due to pregnancy, increases in infant mortality, percentage of low birth weight infants, percentage of premature births, an increase in the proportion of developmental and functional abnormalities, an increase in the number of birth defects, and a higher neonatal mortality rate. The financial costs of these consequences will be met, in many cases, by the taxpayers.

One-third of all abortions currently are performed on teenagers. Most of these young women are unprepared for the emotional, intellectual, social and economic responsibilities of parenthood in a complex society and are unprepared to form stable families with their partners. The argument that they should be forced to continue unplanned pregnancies in order to increase the supply of adoptable babies is both cruel and delusional. More than 90 percent of teenagers who continue unplanned pregnancies to term do not give up their babies for adoption.

The technology of abortion is so widely available among physicians and non-physicians alike that enforcement would be hopeless, so what is the point of this exercise? Are we willing to have a police state and keep all women under constant surveillance to ensure the law is observed? Or will we simply put doctors in jail for performing abortions, leaving transgressions to the untutored? In most societies throughout human existence, various fertility control measures have been used, including abortion. Laws have never prevented abortion, and they never will.

SB 158 appears to be a response of a conservative minority to the relentless social change of the last 20 years. This social change has been fueled to a considerable degree by the introduction of highly effective, safe fertility control measures which are available on a wide scale for the first time in human history. From the point of view of cultural change, it is probably the equivalent in importance to the domestication of fire at the human hearth.

An important consequence of this new availability of fertility control is the enhancement of the status and independence of women, which has been increasing over the past 50 years. The new role of women, however, collides head on with the view that the principal function of women is to bear children. This view is no longer shared by a great many people.

The view that women should confine their activities to reproduction, however, is held by a majority of the Congress, most of whom are men. Their logic, as expressed in SB 158, is that society must be protected against individuals (doctors who perform abortions; women who want them) to protect the embryos. Could it be that there is a scarce supply of human embryos? Could it be that we need a pronatalist public policy because of the shortage of people? Hardly.

One important problem is that women are uppity: They vote, and they are now competing with men for jobs and power. Fetuses, on the other hand, are apolitical, don't argue, present no economic threat, and may be defended along with the flag and motherhood before the voters of election time. They can be defended against sin and immorality, thereby throwing political opponents into disarray.

This conflict brings us clearly to an understanding of the struggle before us. The issue is not the protection of human life. We are already doing that by providing safe abortions for women. The real issue posed by SB 158 is the definition of power: who has it and who doesn't.

The issue is whether power in America will be wielded absolutely by those who cannot get pregnant or whether it will be shared by those who can.

A more basic question before our society is not when life begins, but who is best prepared to decide when to transmit life to a new generation—the individual or the state? The right of the individual woman to make this choice should be supported. In this matter, she is more competent than any government.

Part 6.--Responses of Constitutional Scholars to Letter of Senator Baucus Regarding Probable Impact of S. 158

United States Senate
WASHINGTON, D.C. 20510

June 23, 1981

Dear Professor

I want to reiterate my gratitude for helping the Subcommittee on Separation of Powers evaluate the constitutionality of S. 158. I know how much time you have spent analyzing the bill, but there remain several questions on the impact of S. 158 which to date have not adequately been answered to my satisfaction.

Many witnesses before the Subcommittee have argued that the immediate impact of S. 158 would be to restrict state action by prohibiting states from engaging in or facilitating any conduct which would interfere with the development of the fertilized egg. In other words, the state would be required to limit its conduct with regard to the fertilized egg by the Due Process requirements of the Fourteenth Amendment. I would like to know whether you agree with this analysis of S. 158 on state action.

The confusion has come with regard to what state conduct would be permitted under this Due Process protection granted to the fertilized egg. Specifically, there seems to be agreement that the state could fund abortions in those instances in which the mother's life is in danger because the states would have a compelling state interest in protecting the life of the mother. I am interested in trying to understand what additional state action would be permissable under S. 158.

For example, would the states have a compelling state interest in protecting the mother in cases of incest and rape? Would the states have a compelling interest in protecting the mother in cases where the fetus had a genetically detectable disease which would result in death or serious malformation to the fetus? Would the state have a compelling state interest in permitting the prescription or distribution of those contraceptives which were shown to prevent the implantation of the fertilized egg, such as the IUD or the "morning after pill?"

It is extremely important that the Subcommittee be able to determine with some certainty the likely amount of latitude that tht states would have with regard to control over issues concerning abortion or funding of facilities that perform abortions. I would, therefore, respectfully request that your reply reach me by July 7. I understand this is extremely short notice, but the Subcommittee will begin its formal consideration of the bill on July 9, so your prompt assistance is crucial.

Once again, thank you for your cooperation on this issue.

With best personal regards, I am

Sincerely,

Max Baucus

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

1981 JUL -6 AM 10: 43

June 30, 1981

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator:

In your recent letter concerning S. 158 you asked first whether the immediate impact of the bill would be to restrict State action by prohibiting States from engaging in, or facilitating, any conduct which would interfere with the development of the fertilized egg. I addressed this question at pages 2-4 of my multigraphed statement for the Subcommittee. My answer is, "Probably yes." But the strange form of the bill, and the conflicting statements of its supporters, make it impossible to give a firm opinion.

You asked me to indicate next the circumstances under which a State would be held to have a compelling interest in facilitating any conduct terminating the life of the fetus. In my opinion, no one can predict the judicial answer to this question with any degree of assurance.

Two judicial approaches seem possible. One would start with the premise that the very purpose of the statute is to give the life in the fetus exactly the same constitutional protection as the life of a human person after birth. If this be taken as a predicate -- it does seem to be in truth the central thesis of the proposal -- then a State would be free to take State action assisting in the termination of the pregnancy only under the same circumstances in which a State may constitutionally take action to terminate the life of a person after birth and before death. I would suppose that the Constitution does not permit a State to terminate the life of an infant after birth on the ground that it is horribly deformed or a total imbecile, even though the infant will be for many years a burden to society and a crushing emotional and financial burden to the mother.

Similarly, I would suppose that if I have the misfortune to become utterly senile and hopelessly incapable of caring for myself, the Constitution would prevent the State from terminating my life in order to relieve the lives of my children. If an embryo or fetus is to be given the same degree of protection as the infant or old man, then there are no circumstances in which the State may justify terminating its life except possibly proof that either the unborn child or mother must die. Even then, I would hesitate to assert categorically that the Constitution permits the State to choose which shall live, thus interfering with the natural course of events.

The other approach would be to infer that the statute must be supposed to allow for *some* balancing, because Congress cannot be supposed to be so foolish as to declare that the fetus must be allowed to develop naturally under any and all circumstances regardless of the costs to the mother, perhaps other relatives, and society. Apparently that is the theory underlying what you describe as the general consensus that the bill would leave States free to fund abortions where the mother's life is in danger. If such judicial balancing remains permissible, then the judicial task in other cases will be just like that in *Roe* v. *Wade*: i.e. the Court will have to set the personal and public interest in allowing the embryo to develop against the personal and public interests served by termination of the pregnancy. The only difference would be that in *Roe* v. *Wade* the question was whether the Fourteenth Amendment allowed the State to strike the balance in favor of insisting that the pregnancy continue, whereas in the supposed cases, the question will be whether the State may strike the balance in favor of termination. I see no way of predicting how any particular set of judges would decide.

Your question concerning prevention of the implantation of the fertilized egg by the IUD or "morning-after" pill seems to call for an interpretation of the meaning of the phrase "from conception." I must plead ignorance to the exact meaning of "conception," but I would suppose that the medical profession has an established usage which the statute would be taken to adopt.

I hope this will be helpful.

With best wishes,

Sincerely,

Archibald Cox

AC/lm

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July 7, 1981

The Honorable Max Baucus
1107 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus:

Your letter of June 23, 1981 requests my opinion on (1) whether the Human Life Bill, S. 158, will limit the ability of states to "interfere with the development of the fertilized egg" and (2) whether states will have a compelling state interest in performing or funding certain types of abortions. You ask specifically whether states will be able to fund abortions when the mother's life is in danger, when the pregnancy results from rape or incest, and when the unborn child suffers from various handicaps that are detectable before birth. You also ask whether a state will have a compelling state interest in permitting the prescription or distribution of abortifacient drugs or devices.

To clarify the first question, I assume that your reference to "the fertilized egg" encompasses stages of human life after a sperm and egg cell have united to produce a distinct individual human being, not strictly speaking an "egg."

By recognizing human life to exist from conception, S. 158 will place limitations on the ability of a state to act to terminate a human life after conception. No state would be able to deprive any person - including persons at the stage between conception and birth - of life without due process of law.

Whether states will be able to perform or fund abortions in the special circumstances you mention will depend on the judiciary's view of what constitutes a compelling state interest justifying the taking of human life. A state can deprive a person of a fundamental right, such as the right to life, only if the state's action advances a "compelling state interest" and the state's action is the "least restrictive method" available to effectuate the compelling state interest. *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 155 (1973). It seems safe to predict that courts will regard the protection of the life of the mother as a compelling state interest, since the protection of life is among the highest interests of the state. To my knowledge, all state anti-abortion laws in existence until the *Roe* v. *Wade* decision allowed an exception to preserve the life of the mother. Such laws manifest an apparent consensus that abortions are justified when necessary to save the life of the mother.

In the other circumstances you mention, however, it is more difficult to give a confident legal opinion. For courts to allow states to fund abortions in such circumstances, they would have to find that interests short of protecting human life are compelling state interests. I do not believe that the taking of a human life can be justified except to protect another life. But there is probably not a consensus among judges on this point, and it is possible that some courts could come to a different conclusion than mine. I have found no judicial holdings on this point from the Supreme Court or from lower courts.

Finally, a state would not need a compelling state interest to permit the prescription and distribution of abortifacient drugs or devices, since the state could achieve this end simply by failing to act to prohibit them. S. 158 does not purport to outlaw abortifacients, and it would be unprecedented for a court to compel a state legislature to outlaw any form of private action.

Sincerely yours,

Steph H. Galebach

Stephen H. Galebach

/me

UNIVERSITY OF COLORADO, BOULDER
School of Law

July 2, 1981

1981 JUL -7 : 9 57

Senator Max Baucus
Subcommittee on Separation
of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

The questions you raised in your letter of June 23 regarding the legal consequences of S. 158 are complicated and important. I do not consider it a burden at all, rather an honor, to be asked for my views on those questions.

In general I agree that the "immediate impact" of S. 158 would be to restrict state action that interfered with the development of the fertilized egg. However, my agreement is limited in two respects. First, I do not think that all state policies that "facilitated any [such] conduct" would necessarily contravene S. 158. For example, a state statute for licensing physicians (who would then be qualified to perform abortions) might be thought to facilitate abortions but, in my opinion, would not constitute state action in contravention of S. 158. Second, I do not agree that S. 158 necessarily would prohibit state action that merely "interfered with the development" of the fetus. "Interference" that was not significant enough to violate the 14th Amendment right to life would not seem to be affected by S. 158; the only kind of interference that S. 158 appears to be aimed at is the destruction of the fetus.

Although you state that there seems to be agreement that states would be permitted to fund abortions where the life of the mother was threatened, I must say that I believe the matter is far from certain. When the lives of two "persons" are threatened, may the state choose to protect one at the expense of the other? State policies with respect to kidney dialysis machines and triage systems now make such choices. I know of no Supreme Court decision that bears significantly on the question whether such decision-making systems violate due process of law. Therefore, it is entirely possible that the Court might uphold, as a constitutional matter, a preference for the life of the mother over that of the fetus. On the other hand, it is also possible that the Court might void specific state

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policies that favored the protection of one life over another when, for example, there were inadequate procedures for determining such matters as the extent of danger to each life. But in either case, the decision would be a matter of interpreting the due process clause, not the Human Life Statute. In short, if S. 158 were to effectively accomplish its goal of elevating the legal status of fetuses to that of "persons," the Bill would raise, not answer, a question with respect to fetuses that is generally unanswered today with respect to other persons.

In any event, it seems clear to me that even if a state does not violate due process standards when it encourages the destruction of fetuses in order to save the lives of mothers, it does not follow that a state would be permitted to perform or fund abortions in cases of rape or incest or genetic defect. In such situations, the states' aid, whatever its justification, would amount to the destruction of "persons" (in the statutory sense) and thus violate the statute. There is no general doctrine that a state may encourage the destruction of persons for "compelling" reasons.

It is quite a different question whether a state could *permit* the prescription or distribution of IUD's or morning-after pills. Statutory permission does not necessarily so involve the state in the private use of the IUD or pill (or abortion, for that matter) to render the state conduct illegal under S. 158. The question when private conduct becomes invested with the attributes of state action is, of course, very debatable under the case law. But, to put it simply, it appears to me that mere permission, which stops short of a requirement or a compulsion that the IUD be used or that the abortion take place, would not so involve the state in the private conduct as to make the state's policy illegal. See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974).

I hope these comments are responsive to your concerns. I would be happy to provide any further assistance that you might wish.

Yours truly,

Robt F Nagel

Robert F. Nagel
Professor of Law

RFN:sj

PART 7.--CRS RESPONSE TO SENATOR BAUCUS' REQUEST FOR REPORT ON FOURTEENTH AMENDMENT DEBATES

STATEMENT OF SUBMISSION OF CRS REPORT INTO HEARING RECORD

MR. CHAIRMAN, THE SECOND FINDING OF S. 158 RELATES TO WHETHER OR NOT IT WAS THE INTENT OF THE FOURTEENTH AMENDMENT TO PROTECT ALL HUMAN BEINGS. THIS SUBCOMMITTEE HAS HAD SEVERAL WITNESSES ADDRESS THAT POINT. FOLLOWING THOSE HEARING I REQUESTED THE CONGRESSIONAL RESEARCH SERVICE TO EXAMINE THE DEBATES IN THE 39TH CONGRESS, FIRST SESSION, 1866, AND REVIEW THE FLOOR STATEMENTS CONCERNING THE TERM "PERSON" AND DETERMINE WHETHER THERE WERE ANY REFERENCES TO THE UNBORN WITH RESPECT TO THAT WORD. THE CONGRESSIONAL RESEARCH SERVICE PRODUCED A 22-PAGE REPORT WHICH I WOULD LIKE AT THIS TIME TO INSERT INTO THE HEARING RECORD.

THE REPORT CONCLUDES THAT THERE WAS NO DISCUSSION WHATSOEVER CONCERNING INCLUSION OR EXCLUSION OF FETUSES FROM COVERAGE OF THE FOURTEENTH AMENDMENT. THE REPORT ALSO FOUND THAT THE RIGHTS OF THE UNBORN WERE NOT EVEN AN ISSUE. I THINK THIS CRS REPORT IS IMPORTANT BECAUSE IT DRAWS ATTENTION TO THE FACT THAT THERE WAS NO DIRECT EVIDENCE TO SHOW THAT THE UNBORN WERE INTENDED TO BE PERSONS UNDER THE FOURTEENTH AMENDMENT.

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EXAMINATION OF CONGRESSIONAL INTENTION IN USE OF THE WORD "PERSON" IN THE FOURTEENTH AMENDMENT: ABORTION CONSIDERATIONS

Karen J. Lewis
Legislative Attorney
American Law Division
June 16, 1981

EXAMINATION OF CONGRESSIONAL INTENTION IN USE OF THE WORD "PERSON" IN THE FOURTEENTH AMENDMENT: ABORTION CONSIDERATIONS

This report addresses the question whether the legislative history of the Fourteenth Amendment to the United States Constitution evidences an intent by the framers to protect the unborn offspring as persons with respect to the constitutional guarantees of due process and equal protection. The first portion of this analysis discusses the treatment of the unborn in Roe v. Wade, 410 U.S. 113 (1973), and the Court's conclusion that the framers of the Fourteenth Amendment did not intend the protections of the Amendment to extend to an unborn fetus. Next, a summary of the arguments on both sides of the question will be presented. This presentation of arguments will be followed by an analysis of the legislative history of the Fourteenth Amendment with respect to the use of the word "person." An effort will then be made to conclude what the framers were trying to achieve when they formulated the language of the Amendment to be incorporated into the United States Constitution.

I. ROE v. WADE AND THE MEANING OF "PERSON" IN THE FOURTEENTH AMENDMENT

In Roe, the Supreme Court found that a Texas statute that forbade all abortions not necessary "for the purpose of saving the life of the mother" interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The Court ruled that States may not categorically proscribe abortions by making their performance a crime, and the States may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decision rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. The Court emphasized that the right of personal privacy is a fundamental right, and, therefore, only a "compelling state interest" could justify its limitation by a State.

The Court went on to recognize that the state's interests in protecting maternal health and the preservation of the fetus' potential life were legitimate[1] and that there was a rational connection between these two interests and the state's antiabortion law. But it held these interests insufficient to justify an absolute ban on abortions. Instead, the Court emphasized the durational nature of pregnancy and held the state's interests to be sufficiently compelling to permit curtailment or prohibition of abortion only during specified stages of pregnancy. The Supreme Court concluded that until the end of the first trimester an abortion is no more dangerous to maternal health than childbirth itself, and found that:

> [w]ith respect to the state's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. [2]

Only after the first trimester does the state's interest in protecting maternal health provide a sufficient basis to justify state regulation of abortion, and then only to protect this interest.[3]

The "compelling" point with respect to the state's interest in the potential life of the fetus is at "viability." Following viability, the state's interest permits it to regulate, and even proscribe, an abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. The Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[4/]

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[1] 410 U.S. 113, 148-150.

[2] Id. at 163.

[3] Id. at 163-164.

The Court summarized its holding as follows:

> (a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. 5/

At one point in its opinion, the Court expressed concern about its ability to "resolve the difficult question of when life begins."[6/] However, it is important to emphasize that its introduction of the concept of viability was not meant to deal with, nor is it in any way related to, the question of when life begins. The concept of viability serves only to demark a point in the process of gestation at which a state's interest in potential life becomes compelling and the state may act to proscribe abortion. This is underlined by the Court's clear holding that, even after viability, a woman's due process right to life will prevail over a viable fetus if in the judgment of her physician her life or health would be endangered. A reading of the decision further indicates that the constitutional problem before the Court was not the factual question of when life begins, but rather the legal question of the scope and meaning of the word "person" in the Fourteenth Amendment. The crucial question was what

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4/ *Id*. at 160.

5/ *Id*. at 164-165.

6/ *Id*. at 159.

does the term "person" as used in the Fourteenth Amendment mean.

The Roe opinion directly addressed the issue of what constitutes a "person" under the Fourteenth Amendment and other sections of the Constitution.[7] It indicated that the Constitution never specifically defines "person", but added that in nearly all the sections where the word "person" appears, "...the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application."[8] The Court emphasized that this textual analysis, taken together with the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than they are today, persuaded it "that the word 'person', as used in the Fourteenth Amendment, does not include the unborn."[9] The Court added that this conclusion was in accord with all other precedent that had treated the issue and with its own opinion in United States v. Vuitch[10] which "inferentially is to the same effect, for we would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."[11] Thus, the Court's ruling is a clear substantive interpretation of a constitutional provision.

In summary, the Court rejected Texas' contention in Roe that life begins at conception and that the state has a compelling interest to protect it from that point. Through the process of so ruling, the Court determined that a woman's right to decide whether to terminate a pregnancy is fundamental and that the unborn are not persons protected by the Fourteenth Amendment. Having made this legal interpretation through the reference to the pertinent text of the Constitution, its legislative history, and past judicial precedent, the Court declared that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[12] The Court believed that once its constitutional analysis was complete, there was no warrant for reference to opposing theories of life. It is the Court's substantive holding that a fetus is not a person within the meaning of the Fourteenth Amendment which has given rise to a debate concerning whether this legal interpretation is valid, i.e. whether the Supreme Court made an accurate reading of the term "person" as used in other contexts in the Constitution and in the history of abortion legislation throughout the nineteenth century.

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[7] Id. at 157-162.

[8] Id. at 157.

[9] Id. at 158.

[10] 402 U.S. 62 (1971).

[11] 410 U.S. at 158-159.

II. ARGUMENTS CONTENDING THAT THE TERM "PERSON" IN THE FOURTEENTH AMENDMENT COVERS THE UNBORN

A debate among historians concerning whether Congress intended to protect the rights of corporations as legal persons when it passed the Fourteenth Amendment has been ongoing over the past fifty years or so.[13] The controversy, however, over whether the Amendment's framers sought to extend the guarantees to the unborn is of relatively recent origin. Professor Joseph P. Witherspoon has articulated the basic case in support of the contention that the intent of Congress, when it used the word "person" in the Fourteenth Amendment, was to include the unborn fetus.[14] Elaborations of the Witherspoon thesis have since been articulated by others.[15] Professor Witherspoon attacks the Supreme Court's technique of decision in Roe v. Wade and argues that careful research of the history of the Fourteenth Amendment "... will demonstrate to any impartial investigator that the principal, actual purpose of [the] framers was to prevent any court, and especially the Supreme Court of the United States ... or any other institution of government, whether legislative or executive, from ever again defining the concept of person so as to exclude any class of human beings from the protection of the Constitution and the safeguards provided for the fundamental rights of human beings, including slaves, peons, Indians, aliens, women, the poor, the aged, criminals, the weak, the mentally ill or retarded, and children, including the unborn from the time of their conception."[16] He then goes on to try to establish how in fact the framers did intend to protect the unborn. After conceding that "[t]he most relevant discussions in Congress are those concerned with the issue of slavery, especially in the decade prior to the submission of the Thirteenth Amendment ...," he contends that statements made by those framers who represented areas in which the basic ideas infusing the anti-slavery movement originated reflect concern for broader civil rights principles. Professor Witherspoon links their statements

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[12] Id. at 162.

[13] Graham, Howard Jay. The "Conspiracy Theory" of the Fourteenth Amendment. 47 Yale Law Journal 371 (1938).

[14] 122 Cong. Rec. S 5104-5110 (1976) (Testimony by Professor Joseph Witherspoon, "Continued"

"Continued" Professor of Law at the University of Texas School of Law, before House Judiciary Committee's Subcommittee on Civil and Constitutional Rights; placed in Cong. Rec. of March 3, 1976 by Senator James Buckley.) See also the most recent testimony by Professor Witherspoon before the Senate Judiciary Committee's Subcommittee on Separation of Powers, June 10, 1981.

[15] Gorby, John D. The "Right" to an Abortion the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement. 1979 Southern Illinois University Law Journal 1 (1979); Testimony by Professor William H. Marshner, Professor of Philosophy and Theology, Christendom College, before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981; Testimony by Professor Victor G. Rosenblum, Professor of Law and Political Science, Northwestern University, before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981.

[16] 122 Cong. Rec. S 5105 (1976) (Emphasis supplied.)

and discussions with the political [illegible] of the person and of human rights.[17] [illegible] of the relation of parents to their chil[illegible] to Locke, the child is a person from the time [illegible] because it is the workmanship, the creation [illegible] soul. The parent is under a duty to [illegible] being begotten until its birth, and [illegible] until it is able to shift for [illegible] the fact that the child in the [illegible]

Professor Witherspoon [illegible] tative John A. Bingham of Ohio [illegible] ment to support the position that [illegible] includes the unborn. Congressman [illegible]

> ...The wife owes obedience to the [illegible] protection to the wife, and both owe [illegible] care to their children. This relation lies at the very foundation of our whole social system ... [L]aw is to protect this relation; to protect the personal rights of husband, wife, and children that grow of of it. [19]

Professor Witherspoon views such statements as the foregoing to indicate that Congressmen and Senators of that time "adhered to the view that all men are created by God at their conception within their mothers' wombs and endowed by Him at that time with the inalienable rights to life, liberty, and the pursuit of happiness."[20]

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[17] Id. at S 5106. Professor Witherspoon argues that the "political philosophy espoused by the anti-slavery political leaders as of other American political leaders through the end of the Civil War was that of John Locke. It was this philosophy that lay at the base of their political action."

[18] Id.

[19] Id. at S 5107.

[20] Id.

The second argument made by Professor Witherspoon to support the contention that "person" in the Fourteenth Amendment means the unborn is that laws being passed by the state legislatures to limit abortions at the same time as the Congress passed the Fourteenth Amendment reflect a concern for fetal life. Professor Witherspoon writes, "Logically, these framers should have been concerned with the problem of abortion, and they were. They acted in the political context not only of a great anti-slavery movement, but also of an anti-abortion movement."[21/] He points out that during this period from 1849-1875, states and territories enacted anti-abortion laws, primarily as a result of the pressure from the medical profession to do so. The argument he then makes is two-fold: (1) that the states which so enacted anti-abortion legislation "did so under the persuasion that unborn children were human beings" and (2) since the Fourteenth Amendment was ratified contemporaneously with the passage in the states of anti-abortion laws, the "construction can only be that unborn children are human beings and persons under the Constitution." He emphasizes that any other interpretation of their action "would be out of line with the history of the period."[22/]

Professor Witherspoon also discusses certain actions taken by Congress between 1869 and 1873 which he claims support the position that Congress intended to place the life of the unborn under the protections of the Fourteenth Amendment. There are five actions which he cites specifically: (1) Congress' passage of the District of Columbia Divorce Act of 1860; (2) Congress' passage of the Assimilative Crimes Provision in 1866; (3) acceptance by Congress in 1866 of application of Connecticut's anti-abortion law of 1860 on naval bases

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[21/] Id.

[22/] Id. at S 5108.

in Connecticut; (4) Congress' [illegible] (5) Congress' provision in 1864 for the [illegible] Columbia of a "Home for Friendless Women and [illegible] cludes that the foregoing evince an awareness by the [illegible] state and territorial anti-abortion legislation and its own [illegible] then this legislation by enacting its own legislation [illegible] states, "Thus, throughout the period of debate over [illegible] and Constitutional Amendments their framers [illegible] the unborn child."24/ He thought this "consti[illegible] legislative construction that they [illegible] and a person within their authority [illegible] cluding its Thirteenth and Fourteenth Am[illegible]

In summary, followers of the Witherspoon thesis [illegible] ing of "person" in the Fourteenth Amendment includes the unborn because (1) the framers of the Fourteenth Amendment were very much concerned with protecting the life and freedom of the newly freed slaves and shared the respect for the sanctity of life held by the members of the anti-slavery movement; (2) this concern of the framers with the protection of life is directly related to the laws then being passed by the state legislatures to limit abortions; (3) the simultaneous ratification of the Fourteenth Amendment by the same states that had been enacting anti-abortion laws represents a contemporaneous legislative construction by the states of the meaning of the amendment they ratified; and (4) Congress' action between 1860 and 1873. The emphasis appears to be upon the

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23/ Id. at S 5108.

24/ Id.

25/ Id.

medical and legal climate of the 1860's which this school of thought perceives as being guided by the conviction that the unborn fetus is a person.[26]

III. ARGUMENTS CONTENDING THAT THE TERM "PERSON" IN THE FOURTEENTH AMENDMENT DOES NOT COVER THE UNBORN

Those who take the position that the Fourteenth Amendment was not intended to protect the unborn basically adhere to the reasoning used by the Supreme Court in Roe v. Wade where it concluded that the Fourteenth Amendment did not have prenatal application.[27] The Court first considered the term "person" as used in other contexts of the Constitution and then considered the history of abortion legislation throughout the nineteenth century.

This school of thought contends that the chief intent of the framers of the Fourteenth Amendment was to resolve the future legal status of the emancipated slaves; that the term "person" was introduced to protect aliens as well as citizens. Those who adhere to this position also emphasize that there is no direct evidence showing that the framers intended the words to apply to the unborn. The legislative history does not reveal in any of the debates over the language to be used in the Fourteenth Amendment that the rights of fetuses were even in issue. Furthermore, the history of the nineteenth century state enacted abortion legislation indicates more of a concern for shifting birth rates and female health than for the legal status of the unborn.[28]

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[26] See also testimony by Professors Marshner and Rosenblum before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981; 1979 Southern Illinois University Law Journal 1 (1979).

[27] 410 U.S. at 157.

[28] For an articulation of the arguments presented by those believing that the framers did not intend to have the term "person" in the Fourteenth Amendment include the unborn, see especially: Testimony by Professor James C. Mohr, Professor of History, University of Maryland, before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981; Testimony of Professor Carl N. Degler, Professor of History, Stanford University, before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981. "Continued"

In his testimony before the Senate Judiciary Committee's Subcommittee on Separation of Powers, Professor Carl N. Degler specifically presented a critique of the Witherspoon thesis. He asserts at the outset that, "... most historians believe that protection of the rights of former slaves was the primary purpose of the amendment."[29] Professor Degler continues, "It is true, as Professor Witherspoon points out, that in the 1860's Congress was much concerned with the question of protecting the life and freedom of the newly freed slaves, but at no time did a Congressman explicitly say or even imply that the protection for the former slaves also extended to the unborn."[30] He rejects the quotes from the Congressmen, such as Bingham, used by Witherspoon on the ground that the word "children" was used and in the context meaning those already born.

Professor Degler also dismisses the argument that the Congress which passed the Fourteenth Amendment was aware of the state anti-abortion laws being passed and the state legislators simultaneous concern for the freedom of the former slaves. He points out that, "... there is no mention in the discussion in Congress of these laws nor is there any reference to abortion or to the unborn in the course of the debate on the Fourteenth Amendment."[31] Professor Degler finds no support for the Witherspoon contention that since the Fourteenth Amendment was ratified contemporaneously with the passage in the states of anti-abortion laws, that coincidence reveals that the states were making a

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"Continued" A discussion of the climate of the nineteenth century which experienced a push by the medical profession for state enacted anti-abortion laws can be found in Mohr, James C. Abortion in America: Origins and Evolution of National Policy, 1800-1900 (Oxford, 1978).

[29] Degler testimony, *supra*, at 1.

[30] *Id.* at 2.

[31] *Id.*

contemporaneous legislative construction of the Fourteenth Amendment they ratified. According to Professor Degler, this argument is unsupportable given the fact that "state laws against abortion almost always specified that an abortion could be performed if a physician said such a medical procedure was necessary to save a mother's life."[32/]

Then Professor Degler proceeds to reject all of the five actions cited by Professor Witherspoon as evidencing that Congress intended to treat the unborn as equal to the born.[33/] With respect to the District of Columbia Divorce Act of 1860, he states that it is not clear that Congress was talking about the moment of conception when it provided that offspring of a second or bigamous marriage "born or begotten before the commencement" of the suit for divorce will be deemed the legitmate offspring of the parent who at the time of the marriage was capable of making such a marriage. Professor Witherspoon regards this language as evidence that Congress legislated to protect the unborn from the time of its being begotten or conceived in the womb. He used it as evidence to show Congress' concern in 1860 for protecting the unborn and viewing it as a person from the moment of conception. In refuting this contention, Professor Degler argues that "born or begotten" only "makes a distinction between being outside or inside the womb for _any_ length of time, including a period as short as one day prior to birth."[34/] He views the statute's purpose as one of determining parental responsibility and the legal status of offspring, "_providing_ it was born."[35/]

[32/] _Id_.

[33/] _Id_ at 3-5.

[34/] Id. at 3.

[35/] _Id_. at 3-4.

With respect to the 1866 Assimilative Crimes provision, Professor Degler argues that it too is insufficient evidence to show that Congress intended to give a fetus Fourteenth Amendment protections. This statute acknowledged Congress' acceptance of the state crime on its territories or properties within a state's boundaries when federal law did not deal with the crime. He disagrees with Professor Witherspoon's effort to equate this Congressional acceptance with Congress' recognition that the life of a fetus was equal to the life of born individuals because there were state statutes which did not do that.

Again, Professor Degler rejects the example of Congress passing an act to recognize the application of Connecticut's anti-abortion law on naval bases in Connecticut on the ground that there was no evidence to support the assumption that Congress so acted because it accepted the equality of the unborn with the born.

The Comstock Law of 1873, which barred abortafacients from the mails is also weak evidence in Professor Degler's mind to show that Congress was putting the unborn on par with the born under the Constitution. He writes, "The Comstock laws also forbade contraceptives from the mails, but I do not know that anyone has argued therefrom that Congress sought to include the human egg or human sperm prior to union as a person within the meaning of the Fourteenth Amendment."[36]

Also, Professor Degler refuses to accept the argument that Congress' provision for the establishment of a "Home for Friendless Women and Children" in the District of Columbia illustrates its intent to accord a fetus Fourteenth Amendment protections. In Professor Degler's discussion, he stresses that

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[36] *Id.* at 415.

"the purpose of the home was to assist pregnant women in giving birth to illegitimate children and to help in the adoption of such children."[37] Professor Witherspoon realizes this objective; however he still cites the example as another instance of Congress' special concern for the unborn child. On the other hand, Professor Degler points out that there was never any direct mention of the unborn, rather there was only "an assertion that a concern for a potential child was equal to the concern for a child already born."[38] He then concludes that this evidence "is not an adequate basis for overturning the accepted understanding of the intent of Congress in passing the Fourteenth Amendment. Congress clearly meant to protect the life, liberty, and property of all persons, but there has not been any reason ... to suppose Congress intended fetuses to be treated as persons within the meaning of the Fourteenth Amendment."[39]

Professor Mohr's basic thesis is in agreement with that presented by Professor Degler in addressing the principal contention made by Professor Witherspoon and the evidence used to support that contention. He views the push of anti-abortion laws in the states and territories in the latter part of the nineteenth century in terms of the earlier background of a tolerant attitude in America toward abortion before "quickening." Professor Mohr first points out that, "The Fourteenth Amendment was framed and ratified by policy-makers who had come to maturity in a nation where abortion prior to quickening (which is the first perception of fetal movement and usually occurs near the midpoint of gestation) was a perfectly legal and openly tolerated practice.[40] According to Professor Mohr by 1850, abortion prior to quickening was actually a fairly common, widespread and commercialized practice in most of the states that subsequently ratified the Fourteenth Amendment. In fact, he argues that "...most mid-19th century Americans probably considered abortion prior to quickening much closer to contraception than to manslaughter or homicide."[41] He cites as evidence the antebellum legislation at the state level which linked abortion and contraception. In addition, he asserts that to the extent that antebellum state legislators were concerned with abortion they were "more concerned about those shifting birth rates and female health than they were about the legal status of the preborn."[42]

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[37] Id. at 5.

[38] Id.

[39] Id.

[40] Mohr testimony, supra, at 4.

Professor Mohr also points to the ongoing push for anti-abortion legislation by physicians in the various states and territories which he argues actually intensified after the Fourteenth Amendment was adopted. He writes, "It apparently never occurred, even to them [physicians], that policymakers had advertently or inadvertently guaranteed due process and equal protection to the preborn by ratifying the Fourteenth Amendment."[43] He contends that there is no evidence that these doctors ever claimed that the adoption of the Fourteenth Amendment affected their crusade to limit abortion one way or the other. In none of the anti-abortion legislation enacted subsequent to the ratification of the Fourteenth Amendment was there any reference to the fact that the Amendment was the basis for the statutes. Professor Mohr also argues that there is no evidence that either the Federal Government or state governments moved to protect the unborn with specific actions on their behalf. In fact, to the contrary, he points to evidence that physicians were upset with the way Americans continued to tolerate abortion despite the legislation enacted to limit it, and that state authorities were not vigorously enforcing these laws.

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[41] Id.

[42] Id at 5.

[43] Id.

In concluding the presentation of his position, Professor Mohr looks to the language of the Fourteenth Amendment and the sentence on citizenship, "All persons born."[44] He writes, "To 19th century policymakers the concept of legal personhood was tied up with the process of birth ... the Fourteenth Amendment was never intended to apply to the preborn, and to allege otherwise is historically unjustifiable."[45]

IV. AN EXAMINATION OF THE LEGISLATIVE HISTORY OF THE TERM "PERSON" IN THE FOURTEENTH AMENDMENT

The Fourteenth Amendment was proposed on June 16, 1866 and ratified on July 28, 1868. It had its origin in the resolution offered by Congressman Thaddeus Stevens on December 4, 1865. It was the Joint Committee on Reconstruction of the 39th Congress in which the Fourteenth Amendment originated. The Joint Committee interpreted its broad mandate to include the drafting of constitutional amendments. It was trying to settle the legal status of the newly emancipated Negro slaves, i.e. to insure their equality with Whites in the operation of the laws.

The first section of the Fourteenth Amendment deals with civil rights. It was intended to have basically two effects: (1) to overturn the Supreme Court decision in Dred Scott v. Sandford, 19 How. 393 (1857) which declared that Negroes were not citizens; and (2) to make it illegal for states to deny equal civil rights to those thus made citizens.

Our review of the floor debates in the 39th Congress reveals that there was no express reference to the inclusion or exclusion of the unborn within the category of "persons" that the Fourteenth Amendment was designed to protect.[46]

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[44] Id. at 7.

[45] Id.

From his own examination of the legislative history, constitutional law scholar Raoul Berger observed that the framers "were almost constantly preoccupied with the plight of the former slaves, who were made citizens for their better protection. All in all, it will not do to read the rights of 'persons' more broadly than those that were conferred on 'citizens'."[47] One must be born, and born in a particular geographic area, to acquire citizenship. Berger makes a point of emphasizing that the rights of "persons" could not have been intended by the framers to be broader than those of "citizens" because if that were true, the "unremitting labor to make citizens of blacks was superfluous, especially since suffrage was denied them ... "[48] He then concludes that "persons" and "citizens" had the same rights of "life, liberty, and property." In short, no distinction was warranted in terms of the rights to be enjoyed.[49] If the terms "person" and "citizen" are on an equal footing in the Fourteenth Amendment and citizenship is only accorded to those already born, it would seem logical to conclude that the Amendment does not apply to the unborn.

It is true that the Supreme Court held that a corporation was a "person" for the purposes of the Fourteenth Amendment without really delving into the legislative history of the Amendment and finding direct evidence that such was the intention of the framers.[50] In fact, the Court summarily found that a business corporation is a person under the Fourteenth Amendment. However, the example of the corporation differs somewhat from that of the issue involving the status of a fetus under the Fourteenth Amendment. Roscoe Conkling, a former member of the Joint Congressional Committee which drafted the Fourteenth Amendment in 1866, argued a case before the Supreme Court in 1882[51] and produced for the first time the manuscript journal of the Committee. By his extensive use of quotations and comments based directly on this manuscript, Conkling conveyed to the Court the impression that he and his colleagues in drafting the Fourteenth Amendment's due process and equal protection clause intended the word "person" to include business corporations. Conkling told the Court specifically, "At the time the Fourteenth Amendment was ratified ... individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York ..."[52] One legal scholar noted that an inference that could be drawn from Conkling's remark was that the Joint Committee took cognizance of these appeals and drafted the text of the Fourteenth Amendment with particular regard for corporations.[53] He commented with respect to Conkling:

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[46] See generally, Cong. Globe, 39th Cong., 1st Sess. (1866). (See especially Feb. 13, 14, 15, 20, 26, 27, 28; April 7, 9, 21, 30; May 2, 8, 9, 10, 14, 21, 23, 24, 29, 30; June 4, 5, 6, 7, 8, 13, 14, 15; July 9, 16, and 25, 1866.

[47] Berger, Raoul. Government by Judiciary. (Harvard University Press, 1977), at p. 215. (Emphasis supplied.)

[48] Id.

[49] For a contrary discussion and conclusion, see testimony of Professor Victor G. Rosenblum, before Senate Judiciary Committee's Subcommittee on Separation of Powers, June 1, 1981, at 22. However, Professor Rosenblum does admit one has to be born in order to become a citizen.

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[50] Santa Clara County v. Southern Pacific R.R., 118 U.S. 394, 396 (1886).

[51] San Mateo County v. Southern Pacific R.R., 116 U.S. 138 (1882). A printed copy of the ORAL ARGUMENT OF ROSCOE CONKLING can be found in San Mateo Case, Arguments, and Decisions, in the Hopkins Railroad Collection at the Stanford University Library.

[52] Quoted in Graham, Howard J. The "Conspiracy Theory" of the Fourteenth Amendment. 47 Yale Law Journal 371 (1938).

[53] Id.

> Coming from a man who had twice declined a seat on the Supreme Bench, who spoke from first hand knowledge, and who submitted a manuscript record in support of his stand, so dramatic an argument could not fail to make a profound impression. Within the next few years the Supreme Court began broadening its interpretation of the Fourteenth Amendment, and early in 1886 it unanimously affirmed Conkling's proposition, namely that corporations were "persons" within the equal protection clause. 54/

The Conkling argument has been the subject of controversy and extensive analysis in writings by historians. The debate is thoroughly discussed and re-examined in Graham's 1938 article in the Yale Law Journal. The significant point to make, however, is that with respect to corporations and their status as persons under the Fourteenth Amendment, there are the remarks of Conkling before the Supreme Court in 1882 to point to as some direct form of evidence that the framers were cognizant of the appeals of business corporations. Whereas there is no direct evidence in the history of the Fourteenth Amendment in the case of the unborn fetuses indicating that the framers intended to extend the constitutional guarantees of due process and equal protection to them.

Since its 1886 decision in Santa Clara County v. Southern Pacific Railroad holding summarily that business corporations are persons under the Fourteenth Amendment, the Court has engaged in a case by case process of determination whether a particular constitutional guarantee is available to corporations based on the nature, history, and purpose of the particular constitutional provision. 55/ The Supreme Court has indicated that corporations do not enjoy all of the protections of the Bill of Rights. The Court has said that certain "purely personal"

54/ Id.

55/ See First National Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 14, 822 (1978).

guarantees, e.g. the privilege against compulsory self-incrimination, are not available to corporations because the "historic function" of the particular guarantee has been limited to the protection of individuals.[56] In the arguments made on behalf of the fetus being a "person" under the Fourteenth Amendment, the implication is that the framers intended the unborn to have the same constitutional protections as the born, i.e. all of the guarantees of the Bill of Rights. The unborn and the born would be on an equal level from the standpoint of the guarantees of the Fourteenth Amendment. This distinquishes the status of a fetus and that of a corporation as "persons" within the meaning of the term in the Amendment. Of course, the Court could conceivably grant the fetus the status of personhood and then, as it has done, in the case of the corporation, carve out only certain rights in the Bill of Rights that it could actually enjoy. Should this be done, however, then the unborn fetus and the born human being would not be on an equal footing under the Constitution.

V. CONCLUSION

The Supreme Court in 1973 in its decision in *Roe* v. *Wade* held that a woman's right to decide whether to terminate a pregnancy is fundamental, and that the unborn are not persons protected by the Fourteenth Amendment. It specifically rejected the State of Texas' argument that life begins at conception and that the state has a compelling interest to protect it from that point forward. The Court based its legal interpretation that a fetus is not a person under the Fourteenth Amendment on its reading of the pertinent text in the Constitution, legislative history, and past precedent.

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[56] *United States* v. *White*, 322 U.S. 694, 698-01 (1944).

This substantive holding by the Court that a fetus is not a person for Fourteenth Amendment purposes has given rise to a debate concerning whether this legal interpretation by the Court is a valid one.

Those who contend that the framers intended to include the unborn within the meaning of "person" in the Fourteenth Amendment claim (1) that the Court inaccurately read the term "person" as used in other contexts of the Constitution and (2) that the Court misread the history of abortion legislation throughout the nineteenth century. Those arguing this position link the framers' concern with the life and freedom of the [illegible] cern for the unborn. They maintain that the [illegible] sanctity of life, an outgrowth of the anti-[illegible] lated to the anti-abortion laws being passed by the state [illegible] mid-nineteenth century. They see an interrelationship between the states' enactment of such laws and their ratification of the Fourteenth Amendment. These factors plus approximately five actions by Congress between 1860 and 1873 and what they perceive to be the general medical and legal climate of the 1860's lead them to conclude that the framers intended to give the unborn the protections of the Fourteenth Amendment.

The scholars who take a contrary [illegible] Amendment use of "person" does not [illegible] the reasoning used by the Supreme [illegible] They find no direct evidence revealing [illegible] unborn to enjoy the Fourteenth Amendment [illegible] framers was to resolve the future legal status of the [illegible] Those who argue this position contend that to link this concern of the framers for the life and rights of the freed slaves with the unborn fetus is supportable in the legislative history of the Fourteenth Amendment as well as the historic trends of the time. Moreover, Congress in no specific way ever moved to protect the unborn during the period subsequent to the ratification of the Fourteenth Amendment; however, it did so act on behalf of the free Negro slaves who were now defined as "persons" under the Fourteenth Amendment.

A reading of the legislative history of the Fourteenth Amendment does not reveal any references to the unborn. There are no statements in the debates in the 39th Congress indicating that the framers ever considered the unborn in connection with the Amendment's protections. From the discussion, it can be concluded that at best the intention was basically twofold: (1) to overturn the Supreme Court's decision in Dred Scott v. Sandford that Negroes were not citizens and (2) to make it illegal for states to deny equal civil rights to those thus made citizens. It is also clear that citizenship only applies to the born.

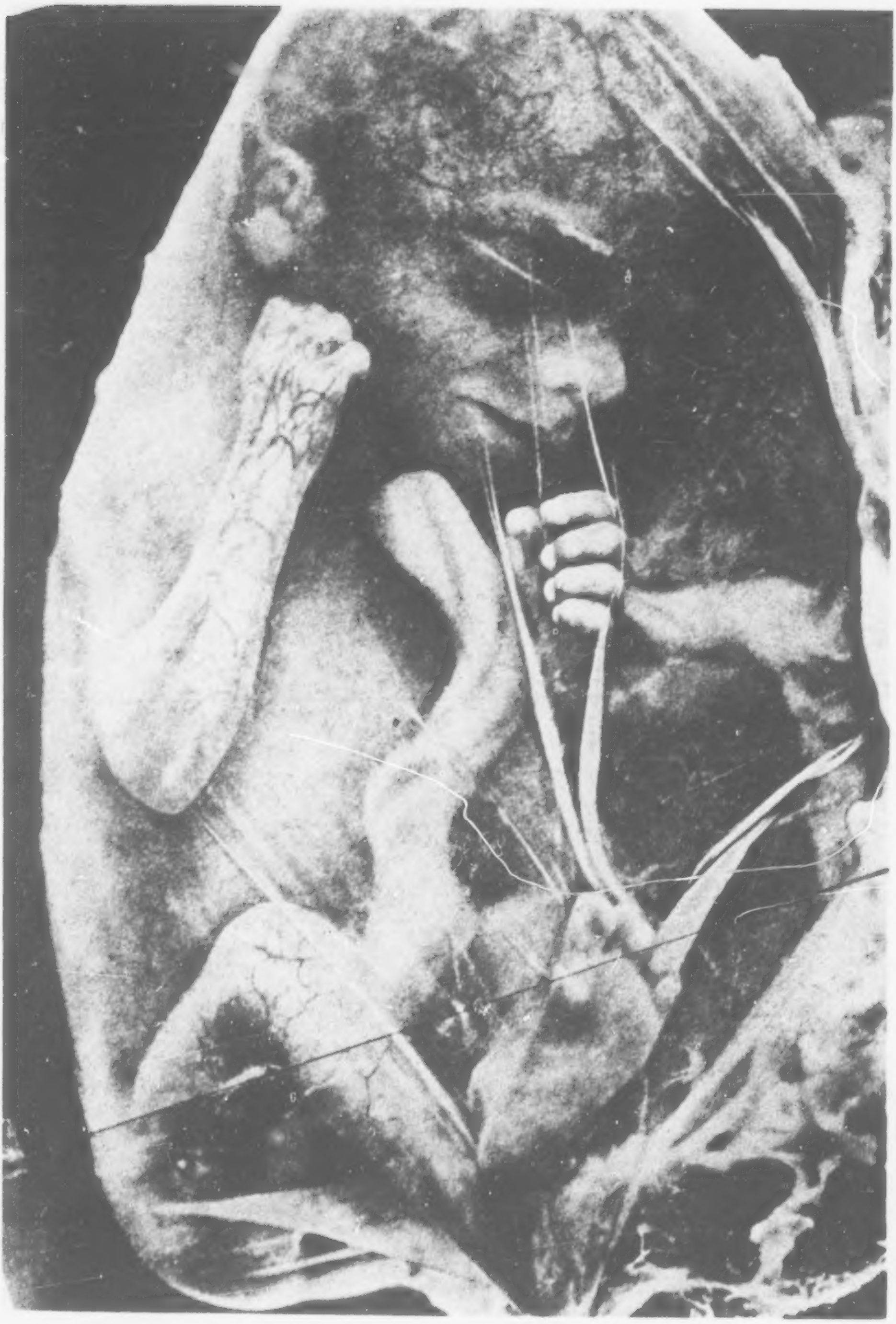
Beyond this examination of the legislative history, one enters the realm of speculation and theorizing concerning what the framers of the Fourteenth Amendment actually intended when they used "person" in the language of the Amendment.

Karen J. Lewis
Legislative Attorney
American Law Division
June 16, 1981

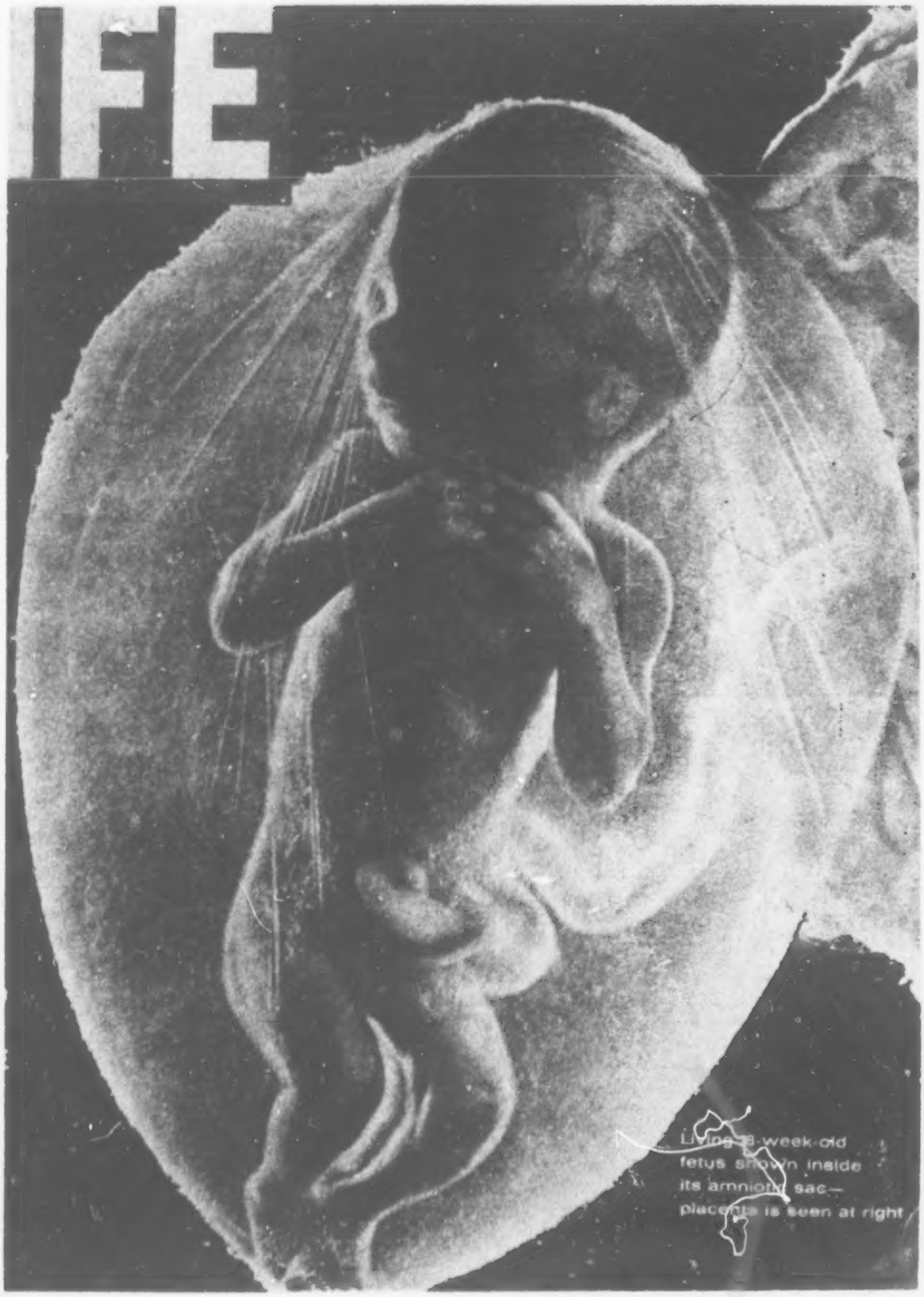
PART 8.—EXHIBITS SUBMITTED BY SUBCOMMITTEE

2. Human being 11 weeks after conception.

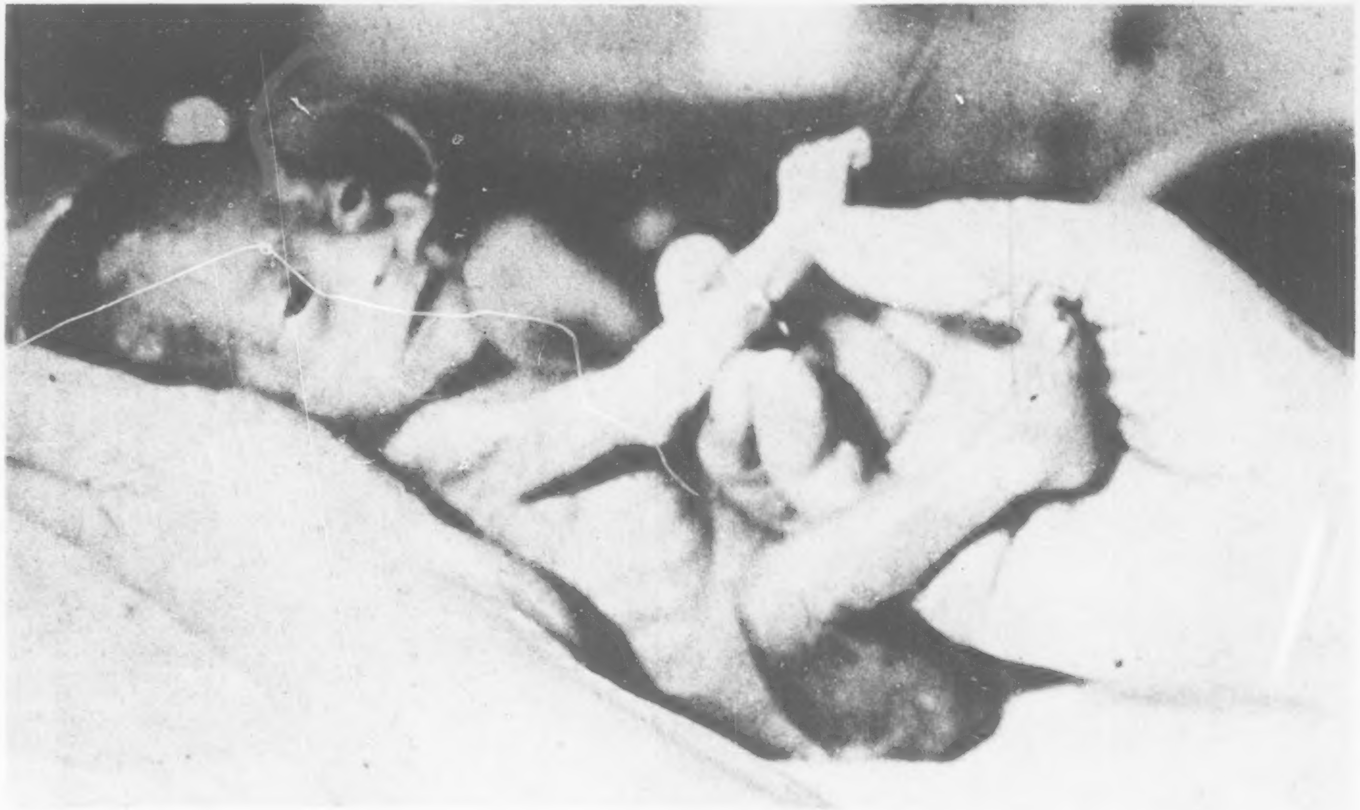
3. Human being 14 weeks after conception.



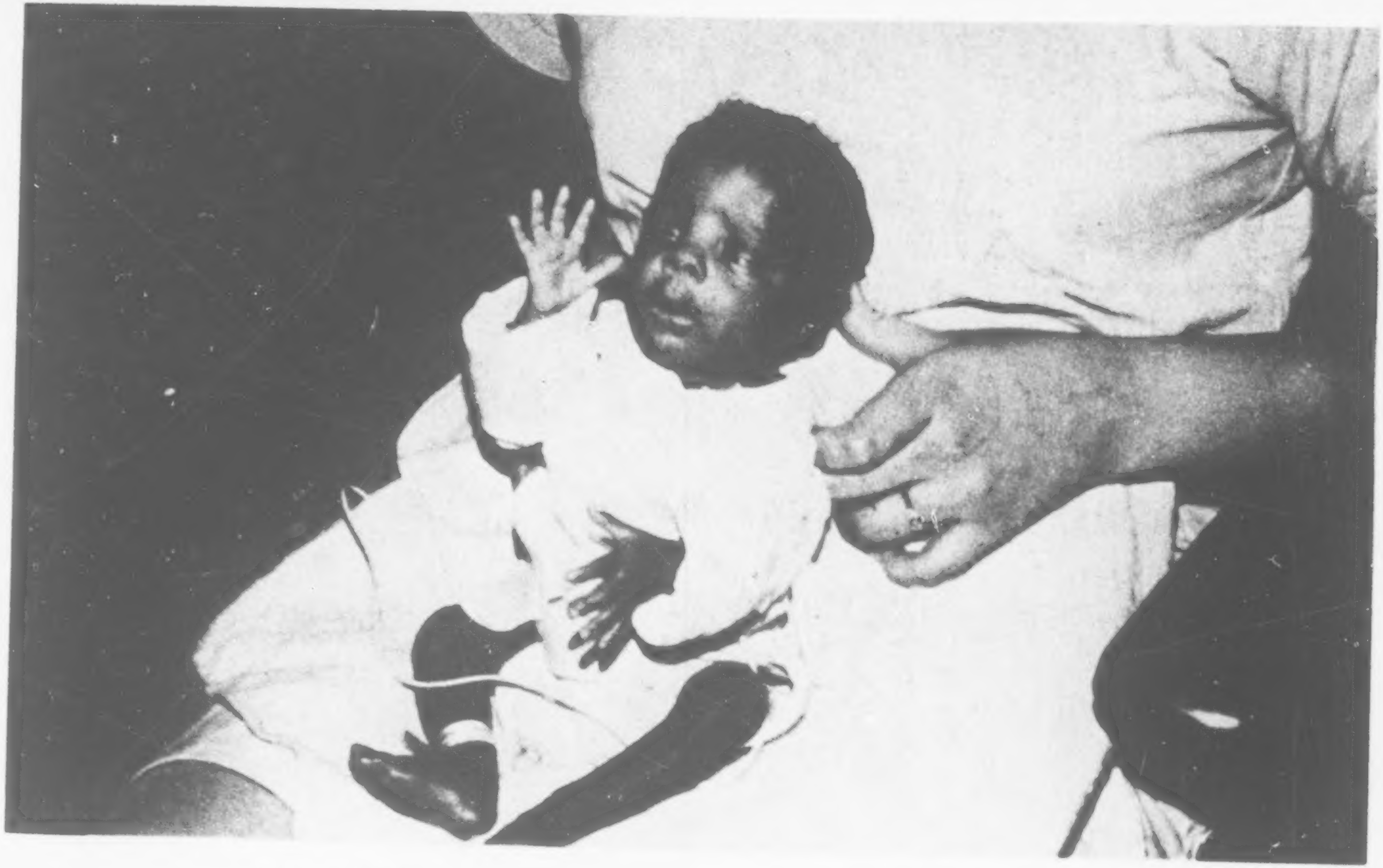
4. Human being 16 weeks after conception.


IFE
Living 18-week-old
fetus shown inside
its amniotic sac—
placenta is seen at right

5. Human being 18 weeks after conception.



6. Kelly Thorman 24 weeks after conception, having been born at 21 weeks' gestation on March 30, 1971.



7. Marcus Richardson was born on January 1, 1972, 20 weeks after his conception. He is shown here 10 weeks after birth.

Credits

1, 2, 3, 6, 7: Willke, “Handbook on Abortion” (1971, 1975, 1979).
4, 5: “Life Before Birth,” Life Educational Reprint 27, reprinted from Life, April 30, 1965.

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